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EDITOR'S NOTE

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tatus: GRANTED

ocketed:
une 28, 1985

Title: Icicle Seafoods, Inc., Petitioner
v.
Larry Worthington, et al.

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Barnes, Clemens H.

Counsel for respondent: Eller, Carson F.

ntry	Date	Note	Proceedings and Orders
1	Jun 28 1985	G	Petition for writ of certiorari filed.
2	Jul 27 1985		Brief of respondents in opposition filed.
3	Aug 7 1985		DISTRIBUTED. September 30, 1985
5	Oct 7 1985		REDISTRIBUTED. October 11, 1985
6	Oct 15 1985		Petition GRANTED. limited to Question 1 presented by the petition.
7	Oct 28 1985	G	Motion of petitioner to dispense with printing the joint appendix filed.
8	Nov 12 1985		Motion of petitioner to dispense with printing the joint appendix GRANTED.
9	Nov 27 1985		Brief of petitioner Icicle Seafoods, Inc. filed.
10	Dec 16 1985		Record filed.
11	Dec 30 1985	G	Motion of Maryland Casualty Company for leave to file a brief as amicus curiae filed.
12	Dec 27 1985		Brief of respondents Larry Worthington, et al. filed.
13	Jan 7 1986		SET FOR ARGUMENT, Tuesday, February 25, 1986. (1st case)
14	Jan 21 1986		Motion of Maryland Casualty Company for leave to file a brief as amicus curiae GRANTED.
15	Jan 23 1986		CIRCULATED.
16	Feb 18 1986	X	Reply brief of petitioner Icicle Seafoods, Inc. filed.
17	Feb 25 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-195

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. _____

ICICLE SEAFOODS, INC.,
an Alaska corporation,

Petitioner,

vs.

LARRY WORTHINGTON, individually,
ROGER CAMERON, individually,
DAVID DAVEY, individually, and
GERALD KENT, individually,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Ninth Circuit.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Ninth Circuit.

Petitioner, Icicle Seafoods, Inc.[1], prays that a Writ of Certiorari issue to review the judgment of the United States

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[1]Petitioner has the following subsidiaries:
Alaska Star, Inc., an Alaska Corporation;
Icicle Seafoods (Japan) Ltd., a Japanese Company;
Icicle Seafoods FSC Ltd., a Guam Corporation

Court of Appeals for the Ninth Circuit entered April 1, 1985, which reversed the judgment of the U.S. District Court for the Western District of Washington, at Seattle.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals was correct in applying a de novo standard of review for ultimate and underlying issues of fact in determining whether employees are "seamen" who are therefore exempt from the overtime provisions of the federal Fair Labor Standards Act.

2. Whether the Wage and Hour Administrator's interpretative regulation is correct that Congress intended the federal Fair Labor Standards Act exemption for the first processing of seafood at sea "in conjunction with ... fishing operations" to mean that the quoted language would require that the process-

ing actually occur onboard the catching vessel, not onboard a processing vessel working in close cooperation and laying alongside at the fishing grounds.

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STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the Ninth Circuit Court of Appeals entered on April 1, 1985, which was issued on a petition for rehearing of the judgment entered on December 27, 1984. The statutory provision conferring jurisdiction is 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The statutes and regulations will be cited with the most relevant portions set forth verbatim. The full pertinent text of statutes and regulations appears in the Appendix.

The exemption for "seamen" from the overtime provisions of the federal Fair Labor Standards Act is found at 29 U.S.C. § 213(b)(6) as follows:

> "The provisions of Section 207 of this title shall not apply with respect to - ... (6) any employee employed as a seaman; ..."

The interpretative regulations of the Administrator of the Wage and Hour Division with respect to the "seaman" exemption are found at 29 C.F.R. § 783.24-783.51.

The exemption from the federal Fair Labor Standards Act for the processing of seafood at sea is found at 29 U.S.C. § 213(a)(5) as follows:

> "The provisions of Sections 206 and 207 of this title shall not apply with respect to - ... (5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; ..." (Emphasis added.)

The interpretative regulations of the Administrator of the Wage and Hour Division with respect to the exemption for the first processing of seafood at sea are found at 29 C.F.R. § 784.0-784.156. The specific regulation in issue is found at 29 C.F.R. § 784.131, which reads, in pertinent part, as follows:

> "Therefore to be 'an incident to, or in conjunction with such fishing operations', the first processing, canning, or packing must take place upon the vessel that is engaged in the physical catching, taking, etc., of the fish. ...[T]he exemption is available to an employee on a fishing vessel who is engaged in first processing fish caught by fishing employees of that same fishing vessel; it would not be available to such an employee if some or all of the fish being first processed were obtained from other fishing vessels, regardless of the relationship, financial or otherwise, between such vessels. ..."

STATEMENT OF THE CASE

The four Plaintiffs sued their employer, Defendant Icicle Seafoods, Inc., claiming they were denied overtime pay

due them under the federal Fair Labor Standards Act ("FLSA"). The alleged violation of the FLSA presented a federal question, and Icicle Seafoods, Inc. was engaged in interstate commerce involving the Alaska seafood industry. Jurisdiction in the court of first i..tance was based on 29 U.S.C. §§ 207 and 216(b) and 28 U.S.C. § 1331.

The employer successfully defended by asserting, in the alternative, two exemptions from the overtime provisions of the FLSA. First, the District Court found that the Plaintiffs were employed as "seamen." 29 U.S.C. § 213(b)(6). Second, the District Court found that the Plaintiffs were employed in the first processing of seafood at sea in conjunction with fishing operations. 29 U.S.C. § 213(a)(5). Pertinent portions of the District Court's underlying fact findings

and ultimate fact findings are quoted below.

> "Defendant Icicle Seafoods owned and operated a seafood processing vessel named the ARCTIC STAR. Each of the Plaintiffs worked for Defendant on board the ARCTIC STAR as members of the Engineering Department. ... The ARCTIC STAR is a nonself-propelled barge which is moved from place to place with the aid of a tow boat, and is located throughout the waters of Alaska or Washington, depending on the season and type of seafood being caught and processed.
>
> "Defendant Icicle Seafoods employed the vessel ARCTIC STAR in the first processing or packing of fish or shellfish caught and delivered to it by other vessels.
>
> * * *
>
> "The first processing or packing occurred while the vessel was moored near or on the fishing grounds to provide immediate access for deliveries of fish or shellfish from fishing vessels or fish tender vessels. The moorages included, among others, Clarks Point, Alaska; Naknek, Alaska; Togiak, Alaska; Stuart Is., Norton Sound, Alaska; Akutan, Alaska; Portage Bay, Kodiak Is., Alaska; Crab Bay, Kenai Peninsula, Alaska; and Heceta Is., Alaska.
>
> * * *

"The first processing or packing occurring on the ARCTIC STAR was in conjunction with and in close cooperation with the catching, taking, or harvesting of the fish or shellfish by other vessels working with the ARCTIC STAR.

* * *

"As members of the Engineering Department, Plaintiffs were responsible for maintaining all systems for support and continuous operation of the vessel while at moorage or underway. Although working in shifts, the Plaintiffs had to be available on call 24 hours a day to perform work at a moment's notice if necessary to keep the vessel operating. Even though the Plaintiffs were not licensed by the Coast Guard as engineers or members of an engineering department, each of the Plaintiffs performed tasks which conformed to those expected of Coast Guard licensed personnel. The very description of the Plaintiffs' work is that of a marine engineer or member of an engineering department. In summary, each of the Plaintiffs were members of the crew of the ARCTIC STAR and performed work which was maritime in character and rendered while the ARCTIC STAR was in navigable waters. Each of the Plaintiffs employment was that of a seaman."

The Court of Appeals reversed the District Court's ruling on the seaman exemption by reviewing the record and

substituting its own fact findings without a determination that the District Court's findings had been clearly erroneous or unsupported by the record. In its first opinion, the Court of Appeals substituted its own judgment in finding that the employees were primarily engaged in industrial maintenance rather than work of a maritime character, as follows:

> "Although some of their work may have been of a maritime character, the dominent employment was industrial maintenance. The maritime work was incidental and occasional, taking but a small portion of the work time.
>
> "We conclude that these employees, while working on a barge anchored in navigable waters, are principally employed not as exempt seamen but as industrial maintenance employees. Because the determination of 'seamen' status under the FLSA is one of law, C.F. Weisel v. Singapore Joint Venture, Inc., 602 F.2d 1185, 1189 N.11 (5th Cir. 1979) (definition of "employee" under FLSA is a legal determination), we substitute our determination for that of the District Court."

With respect to the at-sea first processing exemption (29 U.S.C. § 213(a)(5)), the Court of Appeals adopted the interpretation of the Wage and Hour Administrator (29 C.F.R. § 784.131) and reversed the District Court as a matter of law on the theory that the first processing of seafood could never be "in conjunction with ... fishing operations" unless the processing takes place onboard the catcher vessel.

On petition for rehearing en banc, Icicle Seafoods asserted that the appellate panel had applied a de novo rather than clearly erroneous standard in reviewing the fact findings of the District Court on whether the Plaintiffs were employed as seamen. The Court of Appeals responded by denying the petition for rehearing en banc, withdrawing its previous opinion which had been designated

for publication, and substituting a new opinion dated April 1, 1985. In the opinion reported at 749 F.2d 1409, the Court of Appeals refined its view that a de novo standard may be applied in reviewing whether Plaintiffs' primary employment was that of seaman.

ARGUMENT

I. FIRST ISSUE: THE STANDARD OF REVIEW. The Ninth Circuit Court of Appeals View that A de novo Standard May Be Applied In Reviewing Fact Findings Governing Exemption from the FLSA As "Seamen" Is In Direct Conflict with the Reported Decisions of the Supreme Court.

In Anderson v. Bessemer City, 470 U.S. ____, 106 S.Ct. ____, 84 L. Ed.2d 518 (1985), the Fourth Circuit Court of Appeals was reversed on writ of certiorari for reviewing de novo the District Court's

ultimate fact finding of intentional sex-based discrimination in employment.

This Court established in Walling v. General Industries Co., 330 U.S. 545, 91 L. Ed. 1088 (1947), that the clearly erroneous standard applied to the review of the ultimate question of fact regarding exemption from the FLSA for persons employed in particular capacities. The Sixth Circuit followed the proposition enunciated in General Industries that whether persons are employed in a capacity falling within an exemption is primarily a question of fact which cannot be set aside unless clearly erroneous. Brennan v. Southern Productions, Inc., 513 F.2d 740, 744 (6th Cir. 1975). In this case, however, the Ninth Circuit has declined to follow General Industries reasoning that General Industries dealt with an exemption under 29 U.S.C.

§ 213(a)(1) rather than 29 U.S.C. § 213(b)(6) and, more importantly, that it was limited to cases where the trial court had weighed conflicting testimony. Worthington v. Icicle Seafoods, Inc., 749 F.2d 1409, 1412 (9th Cir. 1984).

In General Industries, the exemption was for persons employed in an "executive" capacity. In this case, the exemption was for persons employed as "seamen." Both exemptions turn on the fact issue of the nature of the actual work performed by the employee. The General Industries case is not distinguishable on this basis.

The lack of conflicting testimony in the instant case is also insufficient to distinguish General Industries and justify application of a de novo standard of review for findings of fact. Anderson v. Bessemer City, 470 U.S. ____, 106 S.Ct. _____ (1985), 84 L. Ed.2d 518, 528-529.

"'In applying the clearly erroneous standard to the findings of a District Court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). ... This is so even when the District Court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. To be sure, various courts of appeals have on occasion asserted the theory that an appellate court may exercise de novo review over findings not based on credibility determinations. [Citations omitted.] This theory has an impressive geneology, having first been articulated in an opinion written by Judge Frank and subscribed to by Judge Augustus Hand, see Orvis v. Higgens, supra, but it is impossible to trace the theory's lineage back to the text of Rule 52, which states straightforwardly that 'findings of fact shall not be set aside unless clearly erroneous.' That the Rule goes on to emphasize the special deference to be paid credibility determinations does not alter its clear command: Rule 52 'does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a District Court's findings unless clearly erroneous.' Pullman-Standard v. Swint, 456 U.S., at 287." Id. at 528-529.

In this case, the Ninth Circuit states in its amended opinion that "we apply a de novo standard of review to the application of the exemption to the facts and review the facts under a clearly erroneous standard." Worthington v. Icicle Seafoods, supra, at 1412. As the Court of Appeals stated in its first opinion which was withdrawn, this really means that "we substitute our determination for that of the District Court." Comparison of the District Court's findings with the amended opinion of the Court of Appeals demonstrates that the Court of Appeals simply read the record, weighed the evidence, and reached a different conclusion on the fact issues. The District Court found that "each of the Plaintiffs were members of the crew of the ARCTIC STAR and performed work which was maritime in character and ... [e]ach of

the Plaintiffs employment was that of a seaman." The Court of Appeals substituted its own finding that "[t]he maritime work was incidental and occasional, taking but a small portion of the work time." Id. at 1412. The District Court entered a finding that the tasks performed by the Plaintiffs were virtually identicial to the tasks expected of a Coast Guard licensed marine engineer or a Coast Guard licensed member of an engineering department.[2]

> "Even though the plaintiffs were not licensed by the Coast Guard as engineers or members of an engineering department, each of the plaintiffs performed tasks which conformed to those expected of Coast Guard licensed personnel. The very description of the plaintiff's work is that of a marine engineer or member of an engineering department."

---

[2] By regulation, the Wage and Hour Administrator interprets the term "seamen" to include customary crew members including engineers. 29 C.F.R. § 784.5.

The Court of Appeals concluded that "the dominant employment was industrial maintenance." Id. at 1412. It is clear that the underlying facts and ultimate fact were reviewed de novo, which conflicts with the reported decisions of this Court.

II. SECOND ISSUE: THE SEAFOOD PROCESSING-AT-SEA EXEMPTION.

Whether the Processing of Seafood at Sea Should Lose its FLSA Exemption if Processed On Board A Vessel Which Did Not Catch the Seafood Poses An Important Federal Question to Be Settled by this Court.

When enacting the Magnusen Fishery Conservation and Management Act, the Congress declared a national interest in promoting the development of underutilized fisheries by the U.S. fishing industry including development of the bottom fish industry off Alaska. 16 U.S.C.

§1801(7). In this respect, the U.S. fishing industry must displace the distant water foreign fleets operating in remote areas within the 200 mile fishery conservation and management zone. To succeed, the U.S. industry must modify the traditional structure found in a coastal fishery where the fishing boat returns to port each night to deliver to a shoreside processor. The U.S. industry must provide processing beyond coastal waters onboard vessels dedicated to processing much like the mother ships of the foreign distant water fleets. The Wage and Hour Administrator's interpretation of the at-sea first processing exemption impedes this national effort by requiring that U.S. industry employ multi-purpose catcher processor vessels rather than single-purpose mother ships. According to the Administrator and the Ninth Circuit, the

FLSA exemption is lost for fish transferred to another boat before processing.

The administrator's interpretative regulation (which was adopted by the Ninth Circuit in this case) adds a requirement for the exemption not appearing in its plain language. 29 C.F.R. § 784.131. The statutory exemption simply states that the processing activity must be "in conjunction with ... fishing operations." 29 U.S.C. § 213(b)(6). Webster's New Collegate Dictionary (1981) defines conjunction as "occurrence together in time or space." The processing of fish at the fishing grounds on board a processing vessel tied alongside a fishing vessel would seem to fall within this common understanding of the term. The Wage and Hour Administrator suggests, however, that Congress understood the term to mean "on the same

boat" by selectively focusing on a small portion of the Senate report issued before the bill was sent to a Senate and House Conference Committee. A review of the legislative history is in order.

The at-sea processing exemption was created by the Fair Labor Standards Amendments of 1961. P.L. 87-30. The bill originated in the House of Representatives and was accompanied by House Report No. 75, dated March 13, 1961. The Senate amended the House bill by striking everything after the ennacting clause and substituting its own version. The Senate amendment was reported out of the Committee on Labor and Public Welfare and accompanied by Senate Report No. 145, dated April 10, 1961. A Conference Committee reconciled the difference between the Senate and House bills as briefly outlined in Conference Report

No. 327, dated May 12, 1961. The meaningful discussion of the Section 13(a)(5) exemption is found in the Senate Report as follows:

> "2. Fishermen and employees handling and processing seafood.
>
> The bill would modify the minimum wage and overtime exemption in section 13(a)(5) of the act for employees engaged in fishing and in specified activities on aquatic products. The activities now enumerated in this section fall into two general groups--(1) those 'offshore' activities which have to do with the procurement of seafood and other forms of aquatic life and which depend to a considerable degree on natural forces; (2) 'onshore' activities which in general have to do with the movement of perishable aquatic products to a nonperishable state or to points of consumption.
>
> The bill would amend the provisions of section 13(a)(5) to remove from this exemption those so-called onshore activities and leave the exemption applicable to 'offshore' activities connected with the procurement of the aquatic products, including first processing, canning or packing at sea performed as an incident to fishing operations, as well as employment in loading and unloading such products for shipment when performed by any employee engaged in these procurement operations ...

* * *

"... The present exemptions in sections 13(a)(5) and 13(b)(4) have been judicially interpreted to apply to all employees employed in the seafood industry including any employee who participates in activities which are necessary to the conduct of the operations specifically described in the exemptions (McComb v. Consolidated Fisheries Company, 174 F.2d 74, C.A. 3, 1949). These interpretations are consistent with the Congressional purpose of treating all employees of one establishment in the same manner under the act and of avoiding segmentation as between different employees of the same employer engaged in the named operations.

For the same reasons, there was included in section 13(a)(5) as amended by the bill an exemption for the 'first processing, canning or packing' of marine products 'at sea as an incident to or in conjunction with such fishing operations.' The purpose of this additional provision is to make certain that the act will be uniformly applicable to all employees on the fishing vessel including those employees on the vessel who may be engaged in these activities at sea as an incident to the fishing operations conducted by the vessel...

* * *

"Section 13(a)(5)--Retains the complete exemption for fishing and related offshore processing operations on

the catch. Removes the minimum wage exemption for employees engaged in onshore fish processing. (The overtime exemption now applicable to fish-canning employees is also provided for these onshore processing employees by a revised section 13(b)(4).)...

* * *

[Minority Report]

"(d) Fishing exemption.--The present wage and overtime exemption for the fisheries industry covers not only the offshore fishing operation, but also the operations of packing, propagating, processing, marketing, freezing, curing, storing, or distributing fish, seafood, and their byproducts. The committee bill strikes out the exemption for all but the offshore operations. Even as to the offshore operations, the present law exempts employees engaged in loading or unloading fish for shipment, but the bill would exempt such activities only when performed by employees actually engaged in fishing... (Emphasis added.)"

Thus, the legislative history of the 1961 amendment establishes the distinction between "onshore" and "offshore" activities as the primary and overriding intent of Congress. It does not establish a reasonable basis for reading into the

statute that "in conjunction with" really means on the same boat rather than as a single enterprise.

As the Administrator himself recognizes, his interpretations in 29 C.F.R. Part 784 simply provide guidance as to how the Department of Labor will construe and enforce the FLSA's provisions applicable to fishing. The ultimate decisions on interpretations of the Act are made by the courts, 29 C.F.R. §§ 784.4 and 784.5. While given some deference, unduly restrictive interpretations of seafood industry exemptions have been rejected by the courts, for example in Mitchell v. Trade Winds Co., 289 F.2d 278 (5th Cir. 1961), and Wirtz v. Chesapeake Bay Frosted Foods Corp., 220 F. Supp. 586 (E.D. Va. 1963), aff'd 336 F.2d 123 (4th Cir. 1964).

PRAYER FOR REVIEW

Accordingly, Petitioner seeks review on writ of certiorari, for the reasons that the Ninth Circuit Court of Appeals has published a decision in conflict with the governing standard of review in this Court and other Circuits, and it has interpreted the scope of an important industry overtime exemption under federal law which is a question that should be settled by this Court.

Respectfully submitted,

GRAHAM & DUNN

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Seafoods, Inc.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY WORTHINGTON, ROGER CAMERON, DAVID DAVEY and GERALD KENT,	Nos. 84-3647 84-3669
Plaintiffs-Appellants, Cross-Appellees,	DC# C82-1464 R
v.	AMENDED OPINION
ICICLE SEAFOODS, INC., a Washington corporation,	
Defendant-Appellee, Cross-Appellant.	

Appeal from the United States
District Court
for the Western District of Washington
District Judge Barbara J. Rothstein,
Presiding

Argued and Submitted November 8, 1984
Decided December 27, 1984
Amended April 1, 1985

Before: WRIGHT, SNEED, and ALARCON,
Circuit Judges.

WRIGHT, Circuit Judge:

The disposition filed December 27, 1984 is withdrawn and replaced by this opinion. The en banc suggestion

filed January 11, 1985, has been circulated to all active judges of the court and none has requested a vote to consider the appeal en banc. The en banc suggestion is rejected.

Maintenance employees aboard a non-self-propelled fish processing barge sued to recover unpaid overtime compensation under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201-219 (1982) (FLSA). The district court found the maintenance employees exempt from the overtime provisions of the FLSA. These employees appeal that determination.

Three issues are presented: (1) are maintenance employees aboard non-self-propelled fish processing barges "seamen" within the meaning of 29 U.S.C. § 213(b)(6), and therefore, exempt from the overtime compensation

provisions of the FLSA; (2) are such employees exempt from overtime as "employees employed in first processing at sea in conjunction with fishing operations" under 29 U.S.C. § 213(a)(5); and (3) did the district court err in denying the defendant's motion seeking a "protective order" barring solicitation of additional plaintiffs?

FACTS

Icicle Seafoods, Inc., (Icicle) is a Washington corporation which owns and operates a non-self-propelled seafood processing barge, the Arctic Star. The barge is towed from place to place in the waters of Alaska, British Columbia, or Washington, depending on the run of the catch delivered by a precommitted fishing fleet.

The Arctic Star is towed to new offshore locations from three to

five times per year. Movement between locations takes from three to seven days. The barge is then generally anchored in one location for approximately seven weeks, but sometimes as long as seven months.

Typically, the Arctic Star is manned by a crew of approximately 160. Of that number, the large majority are processors, with three to eight maintenance employees. The processors receive overtime for all hours worked in excess of 40 hours per week. Their duties are to process raw fish or shellfish to a canned or frozen stage.

Appellants were maintenance engineers aboard the Arctic Star for Periods between 1980 and 1982. Their duties included every repair, maintenance or fabrication necessary to the vessel's operation and safety while at

anchor or under tow. In addition to their regular duties, appellants sometimes operated the anchor winches and tied and untied tender and fishing vessels alongside the barge.

By contract, they received monthly salaries without provision for overtime in exchange for their commitment to work 12 or more hours a day, seven hours [sic] a week. The parties have stipulated that at issue here are over 8,000 hours of overtime pay.

The district court found that the appellants performed work of a maritime character on navigable waters. The court concluded that the appellants were "seamen" and exempt from the overtime provisions of the FLSA under 29 U.S.C. § 213(b)(6).

The district court concluded also that the Arctic Star was engaged in

first processing at sea in conjunction with fishing operations and, as a result, the appellants were exempt from both the FLSA's minimum pay and overtime provisions under 29 U.S.C. § 213(a)(5).

Consistent with its findings, the district court ruled that Icicle was not liable to the appellants for overtime compensation. The court also denied Icicle's motion for an order prohibiting the appellants from soliciting additional maintenance employees to join the suit.

ANALYSIS

Exemptions from the FLSA are narrowly construed to ensure maximum coverage by the remedial legislation. Employers who claim that an exemption applies to their employees must show that the employees fit plainly and unmistakably within its terms. *A.H.*

Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945); *Brennan v. South Davis Community Hospital*, 538 F.2d 859, 865 (10th Cir. 1976). Whether Icicle must pay overtime to maintenance employees aboard the Arctic Star, therefore, depends upon whether the FLSA clearly exempts such employees from the overtime requirements.

I. "Seamen" Exemption

Seamen are exempt from the overtime requirements of the FLSA. 29 U.S.C. § 213(b)(6). Appellants contend that the district court erred in its finding that they were "seamen" under this provision.

The standard of review of exemptions under the FLSA is not clear. *Compare Walling v. General Industries Co.*, 330 U.S. 545, 550 (1947) with *Rutherford Food Corp. v. McComb*, 331

U.S. 722 (1947) (interpreted in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983), as support for a de novo standard) and *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947) (applied in *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984)). In *Walling*, the Supreme Court applied a Rule 52(a) clearly erroneous standard to a section 213(a)(1) exemption.

The lower courts have been inconsistent in applying *Walling*, even to questions arising under section 213(a)(1). *See, e.g., Paul v. Petroleum Equipment Tools Co.*, 708 F.2d 168, 170 (5th Cir. 1983) (Without citing *Walling*, court noted uncertainty in the standard.); *Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 416 (5th Cir. 1975) (Without citing *Walling*,

court reapplied regulation and reversed district court.); *but see, Hoyt v. General Ins. Co.*, 249 F.2d 589, 590 (9th Cir. 1957) (applying *Walling*) and *Wainscoat v. Reynolds Electrical & Engineering Co.*, 471 F.2d 1157, 1161-62 (9th Cir. 1973) (ultimate question of fact).

In *Jones v. Giles*, 741 F.2d at 248, we applied a *de novo* standard of review to an exemption arising under section 213(b)(1), relying on *Levinson*. The *Levinson* Court expressly recognized the distinction between an exception which is measured by regulations promulgated by the Wage and Hour Administrator and an exemption whose scope is determined by interpretation of another act. *Levinson*, 330 U.S. at 676-77 & n.19.

We have held also that determination of employer under § 203(d) is a

question of law but the clearly erroneous standard applies to review of the underlying facts. *Bonnette*, 704 F.2d at 1469. The regulations underlying § 203(d) are merely illustrative, not specific as are those underlying § 213(a)(1). *Compare* 29 C.F.R. § 791.2(a) & (b) *with* 29 C.F.R. § 541.1.

Walling does not necessarily control the outcome of the standard of review question in this case. First, *Walling* dealt with review under § 213(a)(1). Second, the Court of Appeals in *Walling* had reversed the district court based on its reevaluation of conflicting testimony of witnesses. Walling, 330 U.S. at 550. These facts are undisputed. *See Guthrie v. Lady Jane Collieries, Inc.* 722 F.2d 1141, 1146-47 (3d Cir. 1984) (review of a summary judgment).

The regulations interpreting § 213(b)(6) are illustrative and general, more closely paralleling those underlying § 203(d). *Compare* 29 C.F.R. § 783.31-.37 with 29 C.F.R. § 791.2(a) & (b). For that reason, we apply a *de novo* standard of review to the application of the exemption to the facts and review the facts under a clearly erroneous standard. *See Donovan v. Weber*, 723 F.2d 1388, 1391-92 (8th Cir. 1984) (§ 203(r)); *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 969-70 n.4 (5th Cir. 1984) (§ 203(r)); *Gilreath v. Daniel Funeral Home, Inc.*, 421 F.2d 504, 508-10 (8th Cir. 1970) (establishment under § 213(a)(2)); *Homemakers Home & Health Care Services, Inc. v. Carden*, 538 F.2d 98, 107 (6th Cir. 1976) McCree, J., concurring) (retail concept under § 213(a)(2)). *See also United States v.*

McConney, 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied*, 105 S.Ct. 101 (1984) (ultimate facts usually reviewed de novo).

The FLSA does not define "seamen" The term has, however, been interpreted both in regulations and by the courts. Whether one is a "seaman" depends not on the job title or the location of the worksite, but on the character of the work performed. *Walling v. W.D. Haden Co.*, 153 F.2d 196, 199 (5th Cir.), *cert. denied*, 328 U.S. 866 (1946); 29 C.F.R. § 783.33.

The Wage and Hour Administrator has promulgated regulations which define a seaman as one who performs service primarily to aid in the operation of a vessel as a means of transportation. 29 C.F.R. § 783.33; *accord*, *Walling v. Sternberg Dredging Co.*, 64 F.

Supp. 758, 761 (E.D. Mo.), *aff'd*, 158 F.2d 678 (8th Cir. 1946). Reasoned interpretations of an act by the agency charged with administering it are entitled to deference. *Markair, Inc. v. C.A.B.*, 744 F.2d 1383, 1385 (9th Cir. 1984). This circuit relied on the regulation's definition in *Donovan v. Nekton, Inc.*, 703 F.2d 1148 (9th Cir. 1983). There we held that marine and electronic technicians whose primary duties aboard a research vessel did not aid the operation of the vessel as a means of transportation were not "seamen" exempt from the FLSA's overtime provisions. *Id*. at 1151.

One does not become a "seaman" under the FLSA merely by performing services aboard a vessel on navigable waters. For example, bargehands whose

primary duties are loading and discharging cargo and who only rarely perform services which aid the vessel as a means of transportation are not seamen. *Knudsen v. Lee & Simmons, Inc.*, 163 F.2d 95, 96 (2d Cir. 1947); *accord*, 29 C.F.R. § 783.36.

Similarly, employees whose duties on movable dredges are primarily industrial but who occasionally perform maritime duties are not seamen. *Sternberg Dredging Co. v. Walling*, 158 F.2d 678, 681 (8th Cir. 1946). The critical factor is whether the employee's duties primarily aid navigation of the vessel.

The record indicates, and Icicle's counsel conceded at oral argument, that the Arctic Star remained anchored most of the time. During these periods, the appellants primarily

monitored, maintained and repaired the Processing machinery and electric power generators. Although some of their work may have been of a maritime character, the dominant employment was industrial maintenance. The maritime work was incidental and occasional, taking but a small portion of the work time.

We conclude that these employees, while working on a barge anchored in navigable waters, are principally employed not as exempt seamen but as industrial maintenance employees.

II. At-Sea First Processing Exemption

The district court found that the appellants were also excluded from the minimum pay and overtime provisions of the FLSA as workers engaged in: (1) first processing of fish, (2) at sea,

(3) in conjunction with fishing operations. 29 U.S.C. § 213(a)(5). Because we find that the last of these elements is not present, we need not address the appellant's argument as to the others.

Again the question arises which standard of review to apply to an exemption under the FLSA. Because the district court incorrectly interpreted the regulation, we can review the question in this instance as one of law. *See Helland v. Metropolitan Life Ins. Co.*, 488 F.2d 496, 497 (9th Cir. 1973). *See also Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1960 (1984) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law ....").

Under the regulations, processing performed "in conjunction with fishing operations" is interpreted to

mean processing which takes place on the catcher vessel. 29 C.F.R. § 784.131. This regulation is consistent with the Senate Report:

> The purpose of [the § 213(a)(5) exemption] is to make certain that the Act will be uniformly applicable to *all employees on the fishing vessel* including those employees on the vessel who may be engaged in these activities at sea as an incident to the fishing operations *conducted by the vessel*.

S. Rep. No. 145, 87th Cong., 1st Sess. 33, *reprinted in* 1961 U.S. Code Cong. & Ad. News 1620, 1652-53 (emphasis added).

Icicle argues that the Senate Report is merely illustrative of one fact pattern to which the exemption applies, and does not impliedly preclude application of the exemption to processing done on nonfishing vessels. They argue that the regulation is unduly restrictive and should be rejected,

relying on *Mitchell v. Trade Winds Co.*, 289 F.2d 278, 281 (5th Cir. 1961).

Reading the regulation in light of the general policy that exemptions under the FLSA are narrowly construed, we conclude that the Senate Report was not intended to be merely illustrative. . The administrative interpretation embodied in the regulation is correct.

III. Protective Order Against Future Solicitation

In the event of a remand, Icicle seeks consideration of its crossappeal. Icicle contends that the district court erred in denying its motion for a "protective order" prohibiting solicitation of other plaintiffs. Because we find insufficient evidence of solicitation on this record, we cannot say that the district court erred in refusing this injunctive-type relief.

Reversed and remanded for calculation of damages. If there be a subsequent appeal, it will return to this panel.

APPENDIX A-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY WORTHINGTON, ROGER CAMERON, DAVID DAVEY and GERALD KENT,	)	NO. 84-3647 84-3669
Plaintiffs-Appellants, Cross-Appellees,	)	DC# C82-1464R
v.	)	OPINION
ICICLE SEAFOODS, INC., a Washington corporation,	)	
Defendant-Appellee, Cross-Appellant.	)	

Appeal from the United States
District Court
for the Western District of Washington
District Judge Barbara J. Rothstein,
Presiding

[Argued and Submitted November 8, 1984]

Before: WRIGHT, SNEED, and ALARCON,
Circuit Judges.

WRIGHT, Circuit Judge:

Maintenance employees aboard a non-self-propelled fish processing barge sued to recover unpaid overtime compensation under the Fair Labor Standards Act

of 1938, as amended, 29 U.S.C. § 201, *et seq*. (1982) (FLSA). The district court found the maintenance employees exempt from the overtime provisions of the FLSA. These employees appeal that determination.

Three issues are presented: (1) are maintenance employees aboard non-self-propelled fish processing barges "seamen" within the meaning of 29 U.S.C. § 213(b)(6), and therefore, exempt from the overtime compensation provisions of the FLSA; (2) are such employees exempt from overtime as "employees employed in first processing at sea in conjunction with fishing operations" under 29 U.S.C. § 213(a)(5); and (3) did the district court err in denying the defendant's motion seeking a "protective order" barring solicitation of additional plaintiffs?

FACTS

Icicle Seafoods, Inc., (Icicle) is a Washington corporation which owns and operates a non-self-propelled seafood processing barge, the Arctic Star. The barge is towed from place to place in the waters off Alaska, British Columbia, or Washington, depending on the run of the catch delivered by a precommitted fishing fleet.

The Arctic Star is towed to new offshore locations from three to five times per year. Movement between locations takes from three to seven days. The barge is then generally anchored in one location for approximately seven weeks, but sometimes as long as seven months.

Typically, the Arctic Star is manned by a crew of approximately 160. Of that number, the large majority are

processors, with three to eight maintenance employees. The processors receive overtime for all hours worked in excess of 40 hours per week. Their duties are to process raw fish or shellfish to a canned or frozen stage.

Appellants were maintenance engineers aboard the Arctic Star for periods between 1980 and 1982. Their duties included every repair, maintenance or fabrication necessary to the vessel's operation and safety while at anchor or under tow. In addition to their regular duties, appellants sometimes operated the anchor winches and tied and untied tender and fishing vessels alongside the barge.

By contract, they received monthly salaries without provisions for overtime in exchange for their commitment to work 12 or more hours a day,

seven days a week. The parties have stipulated that at issue here are over 8,000 hours of *overtime* pay.

The district court found that the appellants performed work of a maritime character on navigable waters. The court concluded that the appellants were "seamen" and exempt from the overtime provisions of the FLSA under 29 U.S.C. § 213(b)(6).

The district court concluded also that the Arctic Star was engaged in first processing at sea in conjunction with fishing operations and, as a result, the appellants were exempt from both the FLSA's minimum pay and overtime provisions under 29 U.S.C. § 213(a)(5).

Consistent with its findings, the district court ruled that Icicle was not liable to the appellants for over-time compensation. The court also

denied Icicle's motion for an order prohibiting the appellants from soliciting additional maintenance employees to join the suit.

ANALYSIS

Exemptions from the FLSA are narrowly construed to ensure maximum coverage by the remedial legislation. Employers who claim that an exemption applies to their employees must show that the employees fit plainly and unmistakably within its terms. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Brennan v. South Davis Community Hospital*. 538 F.2d 859, 865 (9th Cir. 1976). Whether Icicle must pay overtime to maintenance employees aboard the Arctic Star, therefore, depends upon whether the FLSA clearly exempts such employees from the overtime requirements.

I. "Seamen" Exemption

Seamen are exempt from the overtime requirements of the FLSA. 29 U.S.C. § 213(b)(6). Appellants contend that the district court erred in its finding that they were "seamen" under this provision.

The FLSA does not define "seamen." The term has, however, been interpreted both in regulations and by the courts. Whether one is a "seaman" depends not on the job title or the location of the worksite, but on the character of the work performed. *Walling v. W.D. Haden Co.*, 153 F.2d 196, 199 (5th Cir.), *cert. denied*, 328 U.S. 866 (1946); 29 C.F.R. § 783.33 (1984).

The Wage and Hour Administrator has promulgated regulations which define a seaman as one who performs

services primarily to aid in the operation of a vessel as a means of transportation. 29 C.F.R. § 783.33; *accord*, *Walling v. Sternberg Dredging Co.*, 64 F. Supp. 758, 761 (E.D. Mo.), *aff'd*, 158 F.2d 678 (8th Cir. 1946). Reasoned interpretations of an act by the agency charged with administering it are entitled to deference. *Markair, Inc. v. C.A.B.*, No. 83-7875, slip op. at 4514 (9th Cir. Oct. 12, 1984). This circuit relied on the regulation's definition in *Donovan v. Nekton*, 703 F.2d 1148 (9th Cir. 1983). There we held that marine and electronic technicians whose primary duties aboard a research vessel did not aid the operation of the vessel as a means of transportation were not "seamen" exempt from the FLSA's overtime provisions. *Id*. at 1151.

One does not become a "seaman" under the FLSA merely by performing services aboard a vessel on navigable waters. For example, bargehands whose primary duties are loading and discharging cargo and who only rarely perform services which aid the vessel as a means of transportation are not seamen. *Knudsen v. Lee & Simmons, Inc.*, 163 F.2d 95, 96 (2d Cir. 1947); *accord*, 29 C.F.R. § 783.36.

Similarly, employees whose duties on movable dredges are primarily industrial but who occasionally perform maritime duties are not seamen. *Sternberg Dredging Co. v. Walling*, 158 F.2d 678, 681 (8th Cir. 1946). The critical factor is whether the employee's duties primarily aid navigation of the vessel.

The record indicates, and Icicle's counsel conceded at oral

argument, that the Arctic Star remained anchored most of the time. During these periods, the appellants primarily monitored, maintained and repaired the processing machinery and electric power generators. Although some of their work may have been of a maritime character, the dominant employment was industrial maintenance. The maritime work was incidental and occasional, taking but a small portion of the work time.

We conclude that these employees, while working on a barge anchored in navigable waters, are principally employed not as exempt seamen but as industrial maintenance employees. Because the determination of "seamen" status under the FLSA is one of law, *cf. Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1189 n.11 (5th Cir. 1979) (definition of "employee" under FLSA is

a legal determination), we substitute our determination for that of the district court.

II. At-Sea First Processing Exemption

The district court found that the appellants were also excluded from the minimum pay and overtime provisions of the FLSA as workers engaged in: (1) first processing of fish, (2) at sea, (3) in conjunction with fishing operations. 29 U.S.C. § 213(a)(5). Because we find that the last of these elements is not present, we need not address the appellant's argument as to the others.

Under the regulations, processing performed "in conjunction with fishing operations" is interpreted to mean processing which takes place on the catcher vessel. 29 C.F.R. § 784.131. This regulation is consistent with the Senate Report:

> The purpose of [the § 213(a)-(5) exemption] is to make certain that the act will be uniformly applicable to *all employees on the fishing vessel* including those employees on the vessel who may be engaged in these activities at sea as an incident to the fishing operations *conducted by the vessel*.

S. Rep. No. 145, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Ad. News 1620, 1652-53 (emphasis added).

Icicle argues that the Senate Report is merely illustrative of one fact pattern to which the exemption applies, and does not impliedly preclude application of the exemption to processing done on nonfishing vessels. They argue that the regulation is unduly restrictive and should be rejected, relying on *Mitchell v. Trade Winds Co.*, 289 F.2d 278, 281 (5th Cir. 1961).

Reading the regulation in light of the general policy that

exemptions under the FLSA are narrowly construed, we conclude that the Senate Report was not intended to be merely illustrative. The administrative interpretation embodied in the regulation is correct.

Because the district court's finding that Icicle met its burden of showing that the appellants were exempt from the overtime requirements represents an application of law to the facts, this court may freely substitute its own interpretation. *See Taylor v. Moram Agencies*, 739 F.2d 1384, 1386 (9th Cir. 1984). We reverse the district court's decision on this issue.

III. Protective Order Against Future Solicitation

In the event of a remand, Icicle seeks consideration of its crossappeal. Icicle contends that the district court erred in denying its motion for a

"protective order" prohibiting solicitation of other plaintiffs. Becau-e we find insufficient evidence of solicitation on this record, we cannot say that the district court erred in refusing this injunctive-type relief.

Reversed and remanded for calculation of damages. If there be a subsequent appeal, it will return to this panel.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LARRY WORTHINGTON, individually, ROGER CAMERON, individually, DAVID DAVEY, individually, and GERALD KENT, individually,	)	
Plaintiffs,	)	
v.	)	NO. C82-1464-R
ICICLE SEAFOODS, INC., an Alaska corporation,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendant.	)	

THIS MATTER was tried to this Court on November 14 and 15, 1983. Plaintiffs were represented by Carson F. Eller and Defendant was represented by Erik Rosenquist of the Graham & Dunn law firm. Based on the evidence admitted at trial, the Court hereby enters Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Jurisdiction is vested in this Court by virtue of the Defendant being

an Alaska corporation with headquarters in Seattle and engaged in the Alaska seafood industry and, as such, is involved in interstate commerce. A federal question is presented because Plaintiffs claim that Defendant violated the federal Fair Labor Standards Act ("FLSA") with respect to the employment of Plaintiffs. 29 U.S.C. §§ 207 and 216(b). Jurisdiction is established under 28 U.S.C. § 1331, and venue is laid under 28 U.S.C. § 1391(c).

2. Defendant Icicle Seafoods owned and operated a seafood processing vessel named the *ARCTIC STAR*. Each of the Plaintiffs worked for Defendant on board the *ARCTIC STAR* as members of the Engineering Department during parts of 1980, 1981, and 1982 for Plaintiff Worthington; 1981 and 1982 for Plaintiff Cameron; and 1982 for Plaintiffs Davey

and Kent. The *ARCTIC STAR* is a nonself-propelled barge which is moved from place to place with the aid of a tow boat, and is located throughout the waters of Alaska or Washington, depending on the season and type of seafood being caught and processed.

3. Defendant Icicle Seafoods employed the vessel *ARCTIC STAR* in the first processing or packing of fish or shellfish caught and delivered to it by other vessels.

4. The first processing or packing occurring on board the *ARCTIC STAR* was performed at sea while subject to the perils of the sea. The first processing or packing occurred while the vessel was moored near or on the fishing grounds to provide immediate access for deliveries of fish or shellfish from fishing vessels or fish tender vessels.

The moorages included, among others, Clarks Point, Alaska; Naknek, Alaska; Togiak, Alaska; Stuart, Is., Norton Sound, Alaska; Akutan, Alaska; Portage Bay, Kodiak Is., Alaska; Crab Bay, Kenai Peninsula, Alaska; and Heceta Is., Alaska. The first processing or packing occurring on the *ARCTIC STAR* was not the equivalent of an on-shore processing or packing enterprise. The first processing or packing was an off-shore operation subject to the perils of the sea and conducted at sea.

5. The first processing or packing occurring on the *ARCTIC STAR* was in conjunction with and in close cooperation with the catching, taking, or harvesting of the fish or shellfish by other vessels working with the *ARCTIC STAR*.

6. Each of the Plaintiffs was employed on board the *ARCTIC STAR* and therefore was employed in the first processing of fish or shellfish at sea in conjunction with the fishing operations of catching, taking, or harvesting fish or shellfish.

7. None of the Plaintiffs were members of the Processing Crew on board the *ARCTIC STAR*. The Processing Crew performed all the hands-on processing or packing of the fish or shellfish. Plaintiffs were members of the Engineering Department on board the *ARCTIC STAR*, considered themselves very distinct from the Processing Crew, and did not perform any hands-on processing or packing of fish or shellfish. As members of the Engineering Department, Plaintiffs were responsible for maintaining all systems for support and continuous operation of

the vessel while at moorage or underway. Although working in shifts, the Plaintiffs had to be available on call 24 hours a day to perform work at a moment's notice if necessary to keep the vessel operating. Even though the Plaintiffs were not licensed by the Coast Guard as engineers or members of an engineering department, each of the Plaintiffs performed tasks which conformed to those expected of Coast Guard licensed personnel. The very description of the Plaintiffs' work is that of a marine engineer or member of an engineering department. In summary, each of the Plaintiffs were members of the crew of the *ARCTIC STAR* and performed work which was maritime in character and rendered while the *ARCTIC STAR* was in navigable waters. Each of

the Plaintiffs employment was that of a seaman.

8. The Court does not make a finding on whether Plaintiff Cameron was employed as a "bona fide executive" within the meaning of 29 U.S.C. § 213(a)(1) because such a finding is unnecessary given his exemption under 29 U.S.C. §§ 213(b)(6) and 213(a)(5).

CONCLUSIONS OF LAW

Based upon the preceding Findings of Fact, the Court reaches Conclusions of Law as follows:

1. Each of the Plaintiffs was exempt under 29 U.S.C. § 213(a)(5) from the overtime pay provisions of the federal Fair Labor Standards Act.

2. Each of the Plaintiffs was exempt under 29 U.S.C. § 213(b)(6) from the overtime pay provisions of the federal Fair Labor Standards Act.

3. Defendant Icicle Seafoods did not violate the federal Fair Labor Standards Act.

DATED this _____ day of _____, 1984.

_____
UNITED STATES DISTRICT JUDGE

Presented by:

GRAHAM & DUNN

By_____
Erik Rosenquist

Attorneys for Defendant,
ICICLE SEAFOODS, INC.

FORM APPROVED, NOTICE OF PRESENTATION WAIVED, COPY RECEIVED:

_____
CARSON F. ELLER

Attorney for Plaintiffs
WORTHINGTON, CAMERON, DAVEY, and KENT

ICI5

TITLE 29 U.S.C.

29 U.S.C. § 207. Maximum hours.

(a) . . .

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 213. Exemptions.

(a) The provisions of sections 206 and 207 of this title shall not apply with respect to -

* * *

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

* * *

(b) The provisions of section 207 of this title shall not apply with respect to -

* * *

(6) any employee employed as a seaman;

29 C.F.R. PART 783 - APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES EMPLOYED AS SEAMEN

THE STATUTORY PROVISIONS REGARDING SEAMEN

§ 783.24 The section 13(a)(14) exemption.

Section 13(a)(14) of the Fair Labor Standards Act exempts from the minimum wage and overtime pay requirements of the Act, but not from its child labor provisions, "any employee employed as a seaman on a vessel other than an American vessel".

§ 783.25 The section 13(b)(6) exemption.

Section 13(b)(6) of the Act exempts from the overtime pay requirements of the Act, but not from its other requirements, "any employee employed as a seaman".

* * *

LEGISLATIVE HISTORY AND JUDICIAL CONSTRUCTION OF THE EXEMPTIONS

§ 783.28 General legislative history.

As originally enacted in 1938, section 13(a)(3) of the Fair Labor Standards Act exempted from both the minimum wage and overtime pay requirements "any employee employed as a seaman" (52 Stat. 1050). In 1949 when several amendments were made to the Act (63 Stat. 910), this exemption was not changed except that it was renumbered section 13(a)(14). In the 1961 amendments (75 Stat. 65), a like exemption was retained but it was limited to one employed as a seaman on a vessel other than an American vessel (sec. 13(a)(14)); an overtime exemption was provided for all employees employed as seamen (sec. 13(b)(6)), and those employed as seamen on an American vessel were brought within the minimum wage provisions

(sec. 6(b)(2)).

§ 783.29 Adoption of the exemption in the original 1938 Act.

(a) The general pattern of the legislative history of the Act shows that Congress intended to exempt, as employees "employed as" seamen, only workers performing water transportation services. The original bill considered by the congressional committees contained no exemption for seamen or other transportation workers. At the joint hearings before the Senate and House Committees on Labor, representatives of the principal labor organizations representing seamen and other transportation workers testified orally and by writing that the peculiar needs of their industry and the fact that they were already under special governmental regulation made it unwise to bring them within the scope of the pro-

posed legislation (see Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st sess., pp. 545, 546, 547, 549, 1216, 1217). The committees evidently acquiesced in this view and amendments were accepted (81 Cong. Rec. 7875) and subsequently adopted in the law, exempting employees employed as seamen (sec. 13(a)(3)), certain employees of motor carriers (sec. 13(b)(1)), railroad employees (sec. 13(b)(2)), and employees of carriers by air (sec. 13(a)(4), now sec. 13(b)(3)).

(b) That the exemption was intended to exempt employees employed as "seamen" in the ordinary meaning of that word is evidenced by the fact that the chief proponents for the seamen's exemption were the Sailors Union of the Pacific and the

National Maritime Union. The former wrote asking for an exemption for "seamen" for the reason that they were already under the jurisdiction of the Maritime Commission pursuant to the Merchant Marine Act of 1936 (Joint Hearings before the Committees on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st sess., pp. 1216, 1217). The representative of the latter union also asked that "seamen" be exempted for the same reason saying *** "We feel that in a general interpretation of the whole bill that the way has been left open for the proposed Labor Standards Board to have jurisdiction over those classes of workers who are engaged in transportation. While this may not have an unfavorable effect upon the workers engaged in transportation by water, we feel that it may conflict with the laws now in effect regarding the

jurisdiction of the government machinery now set up to handle these problems" (id. at p. 545). And he went on to testify, "What we would like is an interpretation of the bill which would provide a protective clause for the 'seamen'" (id. at p. 547).

(c) Consonant with this legislative history, the courts in interpreting the phrase "employee employed as a seaman" for the purpose of the Act have given it its commonly accepted meaning, namely, one who is aboard a vessel necessarily and primarily in aid of its navigation (Walling v. Bay State Dredging and Contracting Co., 149 F.2d 346; Walling v. Haden, 153 F.2d 196; Sternberg Dredging Co. v. Walling, 158 F.2d 678). In arriving at this conclusion the courts recognized that the term "seaman" does not have a fixed and precise meaning but that

its meaning is governed by the context in which it is used and the purpose of the statute in which it is found. In construing the Fair Labor Standards Act, as a remedial statute passed for the benefit of all workers engaged in commerce, unless exempted, the courts concluded that giving a liberal interpretation of the meaning of the term "seaman" as used in an exemptive provision of the Act would frustrate rather than accomplish the legislative purpose (Helena Glendale Ferry Co. v. Walling, 132 F.2d 616; Walling v. Bay State Dredging and Contracting Co., supra; Sternberg Dredging Co. v. Walling, supra; Walling v. Haden, supra).

§ 783.30 The 1961 Amendments.

One of the steps Congress took in the 1961 Amendments to extend the monetary provisions of the Act to more

workers was to limit the scope of the exemption which excluded all employees employed as seamen from application of the minimum wage and overtime provisions. This it did by extending the minimum wage provisions of the Act to one employed as a seaman on an American vessel (section 6(b)(2)), by adding to the language of section 13(a)(14) to make the exemption applicable only to a seaman employed on a vessel other than an American vessel, and finally by the addition of a new exemption, section 13(b)(6), relieving employers of overtime pay requirements with respect to those employees employed as seamen who do not come within the scope of the amended section 13(a)(14). (H. Rep. No. 75, 87th Cong., 1st sess., pp. 33, 36; Sen. Rep. No. 145, 87th Cong., 1st sess., pp. 32, 50; Statement of the Managers on the Part of the House, H. (Cong.) Rep.

No. 327, 87th Cong. 1st sess., p. 16.) In view of the retention in the 1961 amendments of the basic language of the original exemption, "employee employed as a seaman", the legislative history and prior judicial construction (see § 783.29) of the scope and meaning of this phrase would seem controlling for purposes of the amended Act.

WHO IS "EMPLOYED AS A SEAMAN"

§ 783.31 Criteria for employment "as a seaman."

In accordance with the legislative history and authoritative decisions as discussed in §§ 783.28 and 783.29, an employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of

such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. This is true with respect to vessels navigating inland waters as well as ocean-going and coastal vessels (Sternberg Dredging Co. v. Walling, 158 F.2d 678; Walling v. Haden, 153 F.2d 196, certiorari denied 328 U.S. 866; Walling v. Great Lakes Dredge & Dock Co., 149 F.2d 9, certiorari denied 327 U.S. 722; Douglas v. Dixie Sand and Gravel Co., (E.D. Tenn.) 9 WH Cases 285). The Act's provisions with respect to seamen apply to a seaman only when he is "employed as" such (Walling v. Haden, supra); it appears also from the language of section 6(b)(2) and 13(a)(14) that they are not intended to apply to any employee who is not employed on a vessel.

§ 783.32 "Seaman" includes crew members.

The term "seaman" includes members of the crew such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards if, as is the usual case, their service is of the type described in § 783.31. In some cases it may not be of that type, in which event the special provisions relating to seamen will not be applicable (Sternberg Dredging Co. v. Walling, 158 F.2d 678; Cuascut v. Standard Dredging Co., 94 F. Supp. 197; Woods Lumber Co. v. Tobin, 199 F.2d 455). However, an employee employed as a seaman does not lose his status as such simply because, as an incident to such employment, he performs some work not connected with operation of the vessel as a means of transportation, such as assisting in the loading or unloading of freight at the

beginning or end of a voyage, if the amount of such work is not substantial.

§783.33 Employment "as a seaman" depends on the work actually performed.

Whether an employee is "employed as a seaman", within the meaning of the Act, depends upon the character of the work he actually performs and not on what it is called or the place where it is performed (Walling v. Haden, 153 F.2d 196; Cuascut v. Standard Dredging Corp., 94 F. Supp. 197). Merely because one works aboard a vessel (Helena Glendale Ferry Co. v. Walling, 132 F.2d 616; Walling v. Bay State Dredging & Contract Co., 149 F.2d 346), or may be articled as a seaman (see Walling v. Haden, supra), or performs some maritime duties (Walling v. Bay State Dredging & Contracting Co., 149 F.2d 346; Anderson v. Manhattan Lighterage Corp., 148 F.2d 971)

one is not employed as a seaman within the meaning of the Act unless one's services are rendered primarily as an aid in the operation of the vessel as a means of transportation, as for example services performed substantially as an aid to the vessel in navigation. For this reason it would appear that employees making repairs to vessels between navigation seasons would not be "employed as" seamen during such a period. (See Desper v. Starved Rock Ferry Co., 342 U.S. 187; but see Walling v. Keansburg Steamboat Co., 162 F.2d 405 in which the seaman exemption was allowed in the case of an article employee provided he also worked in the ensuing navigation period but not in the case of unarticled employees who only worked during the lay-up period.) For the same and other reasons, stevedores and longshoremen are not employed as

seamen. (Knudson v. Lee & Simmons, Inc., 163 F.2d 95.) Stevedores or roust-abouts traveling aboard a vessel from port to port whose principal duties require them to load and unload the vessel in port would not be employed as seamen even though during the voyage they may perform from time to time certain services of the same type as those rendered by other employees who would be regarded as seamen under the Act.

§783.34 Employees aboard vessels who are not "seamen".

Concessionaires and their employees aboard a vessel ordinarily do not perform their services subject to the authority, direction, and control of the master of the vessel, except incidentally, and their services are ordinarily not rendered primarily as an aid in the operation of the vessel as a means of transportation.

As a rule, therefore, they are not employed as seamen for purposes of the Act. Also, other employees working aboard vessels, whose service is not rendered primarily as an aid to the operation of the vessel as a means of transportation are not employed as seamen (Knudsen v. Lee & Simmons, Inc., 163 F.2d 95; Walling v. Haden, 153 F.2d 196, certiorari denied 32 U.S. 866). Thus, employees on floating equipment who are engaged in the construction of docks, levees, revetments or other structures, and employees engaged in dredging operations or in the digging or processing of sand, gravel, or other materials are not employed as seamen within the meaning of the Act but are engaged in performing essentially industrial or excavation work (Sternberg Dredging Co. v. Walling, 158 F.2d 678; Walling v. Haden, supra;

Walling v. Bay State Dredging & Contracting Co., 149 F.2d 346; Walling v. Great Lakes Dredge & Dock Co., 149 F.2d 9, certiorari denied 327 U.S. 722). Thus, "captains" and "deck hands" of launches whose dominant work was industrial activity performed as an integrated part of harbor dredging operations and not in furtherance of transportation have been held not to be employed as seamen within the meaning of the Act (Cuascut v. Standard Dredging Corp. 94 F. Supp. 197).

* * *

§ 783.36 Barge tenders.

Barge tenders on non-selfpropelled barges who perform the normal duties of their occupation, such as attending to the lines and anchors, putting out running and mooring lights, pumping out bilge water, and other similar activities necessary and usual to the navigation of

barges, are considered to be employed as "seamen" for the purposes of the Act unless they do a substantial amount of "non-seaman's" work (Gale v. Union Bag & Paper Corp., 116 F.(2d) 27 (C.A. 5, 1940), cert. den. 313 U.S. 559 (1941)). However, there are employees who, while employed on vessels such as barges and lighters, are primarily or substantially engaged in performing duties such as loading and unloading or custodial service which do not constitute service performed primarily as an aid in the operation of these vessels as a means of transportation and consequently are not employed as "seamen" (McCarthy v. Wright & Cobb Lighterage Co., 163 F.(2d) 92; Anderson v. Manhattan Lighterage Corp., 148 F.(2d) 971, certiorari denied 326 U.S. 722; Woods Lumber Co. v. Tobin, 20 Labor Cases 66, 640 (W.D. Tenn. 1951), aff'd, 199 F.(2d) 455).

Whether an employee is on board a vessel primarily to perform maritime services as a seaman or loading and unloading services typical of such shore-bases personnel as longshoremen is a question of fact and can be determined only after reviewing all the facts in the particular case.

§ 783.37 Enforcement policy for non-seaman's work.

In the enforcement of the Act, an employee will be regarded as "employed as a seaman" if his work as a whole meets the test stated in § 783.31, even though during the workweek he performs some work of a nature other than that which characterizes the service of a seaman, if such non-seaman's work is not substantial in amount. For enforcement purposes, the Administrator's position is that such differing work is "substantial" if it occupies more than 20 percent of the time

worked by the employee during the work-week.

* * *

APPLICATION OF THE EXEMPTIONS

§ 783.48 Factors determining application of exemptions.

The application of the exemptions provided by section 13(a)(14) and section 13(b)(6) of the Act is determined in accordance with their language and scope as explained in §§ 783.24, 783.25, and 783.27, with regard to the principles set forth in § 783.20 and the legislative history and judicial construction outlined in §§ 783.28 through 783.30. Whether a particular employee is exempt depends on what he does, as explained in §§ 783.31 through 783.37. Whether he is exempt from the overtime pay provisions only or from minimum wages as well depends on whether his employment is or is not

on an American vessel, which is determined as indicated in §§ 783.38 through 783.42. In addition, sections 13(a)(14) and 13(b)(6), like other exemptions in the Act, apply on a workweek basis as mentioned in § 783.43 and explained in §§ 783.49 and 783.50.

* * *

§ 783.51 Seamen on a fishing vessel.

In extending the minimum wage to seamen on American vessels by limiting the exemption from minimum wages and overtime provided by section 13(a)(14) of the Act to "any employee employed as a seaman on a vessel other than an American vessel," and at the same time extending the minimum wage to "onshore" but not "offshore" operations concerned with aquatic products, the Congress, in the 1961 Amendments to the Act, did not indicate any intent to remove the crews of fishing vessels engaged in

operations named in section 13(a)(5) from the exemption provided by that section. The exemption provided by section 13(a)(14), and the general exemption in section 13(b)(6) from overtime for "any employee employed as a seaman" (whether or not on an American vessel) apply, in general, to employees, working aboard vessels, whose services are rendered primarily as an aid to navigation (§§ 783.31-783.37). It appears, however, that it is not the custom or practice in the fishing industry for a fishing vessel to have two crews; namely, a fishing crew whose duty it is primarily to fish and to perform other duties incidental thereto and a navigational crew whose duty it is primarily to operate the boat. Where, as is the typical situation, there is but one crew which performs all these functions, the section 13(a)(5) exemption from both

the minimum wage and the overtime provisions would apply to its members. For a further explanation of the fishery exemption see Part 784 of this chapter.

29 C.F.R. PART 784 - PROVISIONS OF THE FAIR LABOR STANDARDS ACT APPLICABLE TO FISHING AND OPERATIONS ON AQUATIC PRODUCTS

* * *

Subpart A - General

INTRODUCTORY

§ 784.0 Purpose.

It is the purpose of this part to provide an official statement of the views of the Department of Labor with respect to the meaning and application of sections 13(a)(5) and 13(b)(4) of the Fair Labor Standards Act, which govern the application of the minimum wage and overtime pay requirements of the Act to employees engaged in fishing and related activities and in operations on aquatic products. It is an objective of this

part to make available in one place, the interpretations of law relating to such employment which will guide the Secretary of Labor and the Administrator in carrying out their responsibilities under the Act.

* * *

§784.2 Matters discussed in this part.

This part discusses generally the provisions of the Act which govern its application to employers and employees in enterprises and establishments of the fisheries, seafood processing, and related industries. It discusses in some detail those exemption provisions of the Act in sections 13(a)(5) and 13(b)(4) which refer specifically to employees employed in described activities with respect to seafood and other forms of aquatic life.

* * *

§ 784.4 Significance of official interpretations.

The regulations in this part contain the official interpretations of the Department of Labor pertaining to the exemptions provided in sections 13(a)(5) and 13(b)(4) of the Fair Labor Standards Act of 1938, as amended. It is intended that the positions stated will serve as "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" (Skidmore v. Swift, 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their duties under the Act, unless and until they are otherwise directed by authorative decisions of the

courts or conclude upon re-examination of an interpretation that it is incorrect. The interpretations contained herein may be relied upon in accordance with section 10 of the Portal-to-Portal Act (29 U.S.C. 251-262), so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect.

§ 784.5 Basic support for interpretations.

The ultimate decisions on interpretations of the Act are made by the courts (Mitchell v. Zachry, 362 U.S. 310; Kirschbaum v. Walling, 316 U.S. 517). Court decisions supporting interpretations contained in this part are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator

to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (Skidmore v. Swift, 323 U.S. 134). In order that these positions may be made known to persons who may be affected by them, official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorganization Plan 6 of 1950, 64 Stat. 1263; Gen. Ord. 45 A, May 24, 1950; 15 FR 3290). As included in the regulations in this part, these interpretations are believed to express the intent of the law as reflected in its provisions and as construed by the courts and evidenced by its legislative history. References to pertinent legislative history are made in this part where it appears that they will contribute to a

better understanding of the interpretations.

* * *

Subpart B - Exemptions Provisions Relating to Fishing and Aquatic Products

THE STATUTORY PROVISIONS

§ 784.100 The section 13(a)(5) exemption.

Section 13(a)(5) grants an exemption from both the minimum wage and the overtime requirements of the Act and applies to "any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning, or packing of such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when

performed by any such employee."

* * *

GENERAL CHARACTER AND SCOPE OF THE SECTION 13(a)(5) EXEMPTION

§ 784.118 The exemption is intended for work affected by natural factors.

As indicated by the legislative history, the purpose of the section 13(a)(5) exemption is to exempt from the minimum wage and overtime provisions of the Act employment in those activities in the fishing industry that are controlled or materially affected by natural factors or elements, such as the vicissitudes of the weather, the changeable conditions of the water, the run of the catch, and the perishability of the products obtained (83 Cong. Rec. 7408, 7443; S. Rep. No. 145, p. 33 on H.R. 3935, 87th Cong., first session; Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52; Walling v. Haden, 153 F.2d 196, certiorari denied 328 U.S. 866).

§ 784.119 Effect of natural factors on named operations.

The various activities enumerated in section 13(a)(5) - the catching, taking, propagating, harvesting, cultivating, or farming of aquatic forms of animal or vegetable life as well as "the going to and returning from work" are materially controlled and affected by the natural elements. Similarly, the activities of "first processing, canning, or packing of such marine products at sea as an incident to, or in conjunction with, such fishing operations" are subject to the natural factors mentioned above. The "loading and unloading" of such aquatic products when performed at sea are also subject to the natural forces.

§ 784.120 Application of exemption to "offshore" activities in general.

The expression "offshore activities"

is used to describe the category of named operations pertaining to the acquisition from nature of aquatic forms of animal and vegetable life. As originally enacted in 1938, section 13(a)(5) exempted not only employees employed in such "offshore" or "trip" activities but also employees employed in related activities on shore which were similarly affected by the natural factors previously discussed (see § 784.103, and Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52). However, the intent of the 1961 amendments to the Act was to remove from the exemption the so-called onshore activities and "leave the exemption applicable to 'offshore' activities connected with the procurement of the aquatic products" (S. Rep. 145, 87th Cong., first session, p. 33). Despite its comprehensive reach (see §§ 784.105 and 784.106),

the exemption, like the similar exemption is the Act for agriculture, is "meant to apply only" to the activities named in the statute (see Maneja v. Waialua, 349 U.S. 254; Farmers Reservoir Co. v. McComb, 337 U.S. 7550.

* * *

FIRST PROCESSING, CANNING, OR PACKING OF MARINE PRODUCTS UNDER SECTION 13(a)(5)

§784.128 Requirements for exemption of first processing, etc., at sea.

A complete exemption from minimum and overtime wages is provided by section 13(a)(5) for employees employed in the operations of first processing, canning, or packing of marine products at sea as an incident to, or in conjunction with "such" fishing operations - that is, the fishing operations of the fishing vessel (S. Rep. 145, 87th Cong., first session, p. 33). To qualify under this

part of the exemption, there must be a showing that (a) the work of the employees is such that they are, within the meaning of the Act, employed in one or more of the named operations of first processing, canning or packing, (b) such operations are performed as an incident to, or in conjunction with, fishing operations of the vessel, (c) such operations are performed at sea, and (d) such operations are performed on the marine product specified in the statute.

§ 784.129 "Marine products".

The marine products which form the basis of the exemption are the "fish, shellfish, crustaceas, sponges, seaweeds, or other aquatic forms of animal and vegetable life" mentioned in section 13(a)(5). The exemption contemplates aquatic products currently or recently acquired and in the form obtained from the sea, since the language of the

exemption clearly indicates the named operations of first processing, canning, or packing must be performed "at sea" and "as an incident to or in conjunction with", fishing operations. Also, such "marine products" are limited to aquatic forms of "life."

§ 784.130 "At sea."

The "at sea" requirement must be construed in context and in such manner as to accomplish the statutory objective. The section 13(a)(5) exemption is for the "catching, taking, propagating, harvesting," etc., of "aquatic forms of animal and vegetable life." There is no limitation as to where these activities must take place other than, as the legislative history indicates, that they are "offshore" activities. Since the purpose of the 1961 amendments is to exempt the "first processing, canning, or packing

such marine products at sea as an incident to, or in conjunction with, such fishing operations," it would frustrate this objective to give the phrase "at sea" a technical or special meaning. For example, to define "at sea" to include only bodies of water subject to the ebb and flow of the tides or to saline waters would exclude the Great Lakes which obviously would not comport with the legislative intent. On the other hand, one performing the named activities of first processing, canning, or packing within the limits of a port or harbor is not performing them "at sea" within the meaning of the legislative intent although the situs of performance is subject to tidewaters. In any event it would not appear necessary to draw a precise line as to what constitutes "at sea" operations, for, as a practical matter, such first

processing, canning, or packing operations are those closely connected with the physical catching of the fish and are performed on the fishing vessel shortly or immediately following the "catching" and "taking" of the fish.

§ 784.131 "As an incident to, or in conjunction with", fishing operations.

The statutory language makes clear that the "first processing, canning, or packing," unlike the other named operations of "catching, taking, propagating, harvesting, cultivating, or farming" are not exempt operations in and of themselves. They are exempt only when performed "as an incident to, or in conjunction with such fishing operations" (see Farmers Reservoir Co. v. McComb, 337 U.S. 755). It is apparent from the context that the language "such fishing operations" refers to the principal named

operations of "catching, taking, propagating, harvesting, cultivating, or farming" as performed by the fishermen or fishing vessel (compare Bowie v. Gonzales, 117 F.2d 11). Therefore to be "an incident to, or in conjunction with such fishing operations", the first processing, canning, or packing must take place upon the vessel that is engaged in the physical catching, taking, etc., of the fish. This is make abundantly clear by the legislative history. In Senate Report No. 145, 87th Congress, first session, at page 33, it pointed out:

> For the same reasons, there was included in section 13(a)(5) as amended by the bill an exemption for the "first processing, canning, or packing" of marine products "at sea as an incident to, or in conjunction with such fishing operations." The purpose of this additional provision is to make certain that the Act will be uniformly applicable to all employees on the fishing vessel including those employees on the vessel who may be engaged in these activities at sea as an incident to the fishing operations conducted by the vessel.

In accordance with this purpose of the section, the exemption is available to an employee on a fishing vessel who is engaged in first processing fish caught by fishing employees of that same fishing vessel; it would not be available to such an employee if some or all of the fish being first processed were obtained from other fishing vessels, regardless of the relationship, financial or otherwise, between such vessels (cf. Mitchell v. Hunt, 263 F.2d 913; Farmers Reservoir Co. v. McComb, 337 U.S. 755).

§ 784.132 The exempt operations.

The final requirement is that the employee on the fishing vessel must be employed in "the first processing, canning or packing" of the marine products. The meaning and scope of these operations when performed at sea as an incident to the fishing operations of the vessel are

set forth in §§ 784.133 to 784.135. To be "employed in" such operations the employee must, as previously explained (see §§ 784.106 and 784.121), be engaged in work which is clearly part of the named activity.

§ 784.133 "First processing."

Processing connotes a change from the natural state of the marine product and first processing would constitute the first operation or series of continuous operations that effectuate this change It appears that the first processing operations ordinarily performed on the fishing vessels at sea consist for the most part of eviscerating, removal of the gills, beheading certain fish that have large heads, and the removal of the scallop from its shell. Icing or freezing operations, which crdinarily immediately follow these operations, would also

constitute an integral part of the first processing operations, as would such activities as filleting, cutting, scaling, or salting when performed as part of a continuous series of operations. Employment aboard the fishing vessel in freezing operations thus performed is within the exemption if the first processing of which it is a part otherwise meets the conditions of section 13(a)(5), notwithstanding the transfer by the 1961 amendments of "freezing", as such, from this exemption to the exemption from overtime only provided by section 13(b)(4). Such preliminary operations as cleaning, washing, and grading of the marine products, though not exempt as first processing since they effect no change, would be exempt as part of first processing when done in preparation for the first processing operation described above including

freezing. The same would be true with respect to the removal of the waste products resulting from the above described operations on board the fishing vessel.

§ 784.134 "Canning."

The term "canning" was defined in the legislative history of the 1949 amendments (House Conference) Report No. 1453, 81st Cong., first session; 95 Cong. Rec. 14878, 14932-33). These amendments made the "canning" of marine products or byproducts exempt from overtime only under a separate exemption (section 13(b)(4), and subject to the minimum wage requirements of the Act (see § 784.136 et seq.). The same meaning will be accorded to "canning" in section 13(a)(5) as in section 13(b)(4) (see § 784.142 et seq.) subject, of course, to the limitations necessarily imposed by the context in which it is found. In

other words, although certain operations as described in § 784.142 et seq. qualify as canning, they are, nevertheless, not exempt under section 13(a)(5) unless they are performed on marine products by employees of the fishing vessel at sea as an incident to, or in conjunction with the fishing operations of the vessel.

§ 784.135 "Packing."

The packing of the various named marine products at sea as an incident to, or in conjunction with, the fishing operations of the vessel is an exempt operation. The term "packing" refers to the placing of the named product in containers such as boxes, crates, bags, and barrels. Activities such as washing, grading, sizing, and placing layers of crushed ice in the containers are deemed a part of packing when performed as an integral part of the packing operation. The

packing operation may be a simple or complete and complex operation depending upon the nature of the marine product, the length of time out and the facilities aboard the vessel. Where the fishing trip is of short duration, the packing operation may amount to no more than the simple operation, of packing the product in chipped or crushed ice in wooden boxes, as in the case of shrimp, or placing the product in wooden boxes and covering with seaweed as in the case of lobsters. Where the trips are of long duration, as for several weeks or more, packing the operations on fishing vessels with the proper equipment sometimes are integrated with first processing operations so that together these operations amount to readying the product in a marketable form. For example, in the case of shrimp, the combined operations may consist of the

following series of operations - washing, grading, sizing, placing 5-pound boxes already labeled for direct marketing, placing in trays with other boxes, loading into a quick freezer locker, removing after freezing, emptying the box, glazing the contents with a spray of fresh water, replacing the box, putting them in 50-pound master cartons and finally stowing in refrigerated locker.

OPPOSITION

BRIEF

85-195

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. _____

ICICLE SEAFOODS, INC.,
an Alaska corporation,

Petitioner,

vs.

LARRY WORTHINGTON, individually,
ROGER CAMERON, individually,
DAVID DAVEY, individually, and
GERALD KENT, individually,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the United States Court of Appeals
for the Ninth Circuit.

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EDITOR'S NOTE

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SUMMARY OF ARGUMENT

The decision below was in accordance with the body of law that has grown out of the Court's interpretation of Rule 52(a) in applying the "clearly erroneous" standard. Secondly, the use of "onshore" rules and regulations on wage and overtime pay of the Fair Labor Standard Act is more logical than the "process-at-sea exemption". There is no questions of law at issue that justifies the grant of a writ of social relief here.

ARGUMENT

I. FIRST ISSUE: THE STANDARD OF REVIEW. The Ninth Circuit Court of Appeals' was correct in the use of the de novo Standard of review when the findings of facts and conclusions of law were not

prepared by the District Judge and a distinction between the two was not readily discernable.

"The Court of Appeals is not bound by the District Court's conclusions of law and may review them de novo."Graham v. John Deere Company of Kansas City, 383 U.S. 1.

The leading case in Mr. Moore's interpretation of Rule 52(a) is United States v. United States Gypsum Company, 68 S.Ct. 525. The Court there stated:

"That rule 52(a) prescribes that findings of facts in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses'."

Another portion of United States Gypsum Company ruling states:

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This case went on to find the findings of fact to be clearly erroneous.

Mr. Moore's observation of the United States Gypsum Company case concluded that:

"Findings on mixed question of law and facts are not binding upon the Appellate Court when there is error as to the law (oral testimony in conflict with contemporaneous documents was given little weight since the crucial issue involved mixed questions of fact and law.)"

The record does not reflect the Court's instructions on the preparation of findings of fact and conclusions of law. Although both counsel were present at the time the District Court rendered its decision and both counsel requested that a court reporter be present to record the memoranda opinion, the District Court rejected same and read from prepared notes the decision of the Courts. The District Court then instructed the defendant, ICICLE

SEAFOODS', counsel to prepare findings and conclusions. This method of concluding the trial is in violation of Rule 52(a). The Court states in E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 640:

"(3) We, along with other courts, have on a number of occasions--one as recently as a few months ago in Holsey v. Armour & Company, 683 F.2d 864 (4th Cir. 1982)--expressed our disapproval of a trial court's practice of announcing its decision and then requesting the prevailing party to prepare findings of fact and conclusions of law which the court adopts almost word-for-word in support of its previously announced decision. The reason for such disapproval is inherent in Rule 52(a), Fed.R.Civ.P., a fair compliance with which 'requires the trial court to find the facts on every material issue, including relevant subsidiary issues, and to 'state separately' its conclusions thereon with clarity.' Kruger v. Purcell, 300 F.2d 830, 831 (3rd Cir. 1962); De Medina v. Reinhardt, 686 F.2d 997, 1011 (D.C. Cir. 1982).3 As the Court in Sims v. Greene, 161 F.2d 87, 89 (3d Cir. 1947), said in language quoted and approved by us in Consolidation Coal Co. v. Disabled Miners of So.W.Va., 442 F.2d 1261, 1269 (4th Cir.), cert. denied, 404 U.S. 911, 92 S.Ct 228, 30 L.Ed.2d 184 (1971), '(t)he conclusion is inescapable that since a district court is required

by the rule (Rule 52(a)) to make findings of fact, the findings must be based on something more than a one-sided presentation of the evidence,' or, as the Court in the same opinion repeated, '(f)inding facts (under Rule 52(a)) requires the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy alone, but by both.' 4 See to the same effect: McManus v. Midland Valley Lumber Co., 348 F.2d 898, 900 (4th Cir. 1962) ("...must necessarily consider all available evidence bearing upon the issue'); Burgess v. Farrell Lines, Inc., 335 F.2d 885, 889, (4th Cir. 1964); Sligh v. Columbia, Newberry and Laurens Railroad Co., 250 F. Supp. 490, 491 (D.S.C. 1966), aff'd. 370 F.2d 979 (4th Cir.), cert. denied, 386 U.S. 1007, 87 S.Ct. 1349, 18 L.Ed.2d 434.

E.E.O.C. vs. Federal Reserve Bank of Richmond, 698 F.2d 633, quoted U.S. Gypsum Company, supra, and stated as follows:

"All these considerations prompted the Supreme Court in U.S. v. Crescent Amusement Co., 323 U.S. 173, 184-85, 65 S.Ct. 254, 259-260, 89 L.Ed. 160 (1944) to comment that the adoption of 'findings (proposed by one of the parties to the

suit and adopted by the trial judge) leave much to be desired in light of this function of the trial court,' under the Rules. This is so because an appellate court will 'feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered' when factual findings were not the product of personal analysis and determination by the trial judge." James v. Stockham Valves & Fittings Co., 559 F.2d 310.

In the case at bar, the credibility of the witnesses was not at issue (this being one of the factors considered by United States Gypsum, supra), as the work place of the plaintiffs on board the non-motorized barge, Arctic Star, was not in dispute. It was agreed throughout the entire trial that the barge was at all times anchored in shallow waters and spent very little time at sea. That, plus the definition of the word "seaman" can be both a factual finding and a

conclusion of law. The comments of Mr. Moore on Rule 52.05 "Moore's Federal Practice, Second Edition, Book 5A, is very appropriate for he stated:

"Particularity in Finding: Distinguish between facts and law.

(1) General Analysis: To draw a distinction between fact and law is difficult if not impossible to make at times, and in pleading the profession has long been accustomed to the use of terms which are mixed conclusions concerning propositions of facts and law. Rule 52(a), on the other hand, following the old equity practice distinguishes between fact and law, or it provides that the trial court shall find the facts specially and state separately its conclusions of law thereon. A scientific distinction between fact and law is not workable. Nor would such a distinction serve the purpose behind Rule 52, which is to aid the trial court in making a correct appraisal of the evidence and the law to the end that a sound decision is made, to show what has been adjudicated for future purposes, res judicata and estoppel by judgment, and to aid the Appellate Court where an appeal is taken."

It was thus analized in Harrison v. Indiana Auto Shredders Co., 528 F.2d

1120:

"Our review of trial court's findings under Rule 52, Fed. Rules Civil Proc. and its award of damages is ordinarily limited to only what is 'clearly erroneous'. Upon critical examination of the record, the findings of fact, and the conclusions of law, however, we encounter mixed questions of law and fact, findings in part that are clearly erroneous, and applications of the wrong legal standards. In such a situation, the trial court's determinations are more freely reviewable and vunerable to attack than they normally would be under operation of the 'clearly erroneous' test of Rule 52. See Chandler vs. United States, 226 F.2d 403, 405 (7th Cir. 1955)."

The question of who is a "seaman" was discussed in Cleary v. U.S. Lines Co., 41 F.2d 1009 (2nd Cir.). The Second Circuit set forth its proposition that a finding of negligence is freely reviewable de novo as a question of law, a principle which has been consistently followed by that circuit."

(A "seaman", not unlike negligent, can be both a conclusion of law or a finding of fact dependent upon where he is located or the type of work he does.)

II. SECOND ISSUE: THE SEAFOOD PROCESSING-AT-SEA EXEMPTION.

Whether a non-motorized barge tied up to shore or anchored in shallow waters more closely resemble fish processing on shore rather than at sea.

The history of 29 USC 213 (a)(5) and 213 (b)(4) reveals that 213 (a)(5) applied to "offshore" processing of fish "at sea". Whereas, 213(b)(4) applied to onshore processing.

Since the invention of the non-motorized fish processing barge, the Fair Labor Standards Act as it applies to the fishing industry has not been amended or updated. The 95th Congress in 19___ repealed Section 213 (b)(4) of the Fair Labor Standard Act and thus removed onshore fish processing from the list of

exemptions. Therefore, in order for the engineers to be exempt as seaman, it is correctly interpreted in CFR 784.130 which states:

> "on the other hand, one performing the named activities of first processing canning or packing within the limits of a port or harbor is not performing them 'at sea' within the meaning of the legislative intent, although the situs of performance is subject to tidewaters."

CFR 784.137 explains the exemption under 213 (a)(5) as one being necessitated by the perishability of fresh fish. Overtime pay during the time of the catch in the first processing at sea would be impracticable. Once the fish is brought to the onshore facilities long strenous hours by the same personnel are impracticable and not called for. Onshore processors, as well as processors

on barges can work in shifts and limit their work to eight hours per day. At no place are the words "at sea" found in 213(b)(4) of USC.

CONCLUSION

Existing precedent on the interpretation of Rule 52(a) reveals a reluctance on the part of the reviewing courts to reverse district courts under the "clearly erroneous" concept. The reviewing court gives as one reason for their reluctance, the district court's ability to judge the credibility of witnesses. In the case at bar, the credibility of witnesses was not a factor as the facts used by the court to make its decision were basically undisputed. There was no argument between the parties

as to where the barges were located, how often they were moved, and the type of work performed by the Plaintiffs. The District Court nevertheless used these facts to arrive at a conclusion of law that the Plaintiffs were exempt under FLSR because they were "seaman". It is therefore obvious that the findings of fact and conclusions of law submitted by defense counsel at the request of the district court are a mixture of findings and law. The "clearly erroneous" rule is not applicable to conclusions of law, and the Appellate Court's de novo review was an absolute necessity, falling well within existing precedent. Once the credibility of witnesses portion of the Rule is removed and the findings of fact

and conclusions of law are determined to be mixed, the Court of Appeals is left with no place to go but, de novo.

In view of Mamiye Bros. v. Barber Steamship Lines, Inc., 360 F.2d 774 (1966), it is the position of the employees that a definition of "seaman" being both a fact and law issue, the "clearly erroneous" standard does not apply.

SECOND ISSUE:

Conspicuously absent from the petitioner's brief is the fact that processers on board the Arctic Star numbered around 150 all received overtime pay for any hours in excess of forty (40) per week. The engineers aboard the Star

varied from two (2) to a maximum of eight (8). If the engineers are not entitled to overtime than neither are the processers as they are all aboard the same vessel, anchored in the same location, and performing work designed to obtain a common goal. Despite this bit of logic, it is obvious that the need for an exemption does not exist aboard a processing barge.

The history of the Fair Labor Standard Act reveals the reason for passing the Act were at least threefold. One was to distribute more evenly among the available work force the limited number of jobs that existed during the great depression. Secondly, the payment of overtime was designed as an incentive to discourage employers from abusing their employees with long and strenous

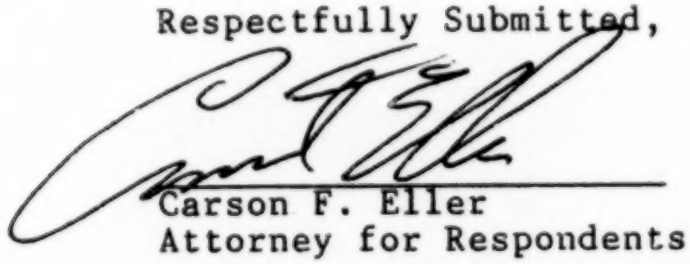
hours, and thirdly, the elimination of fatigue that long and strenous hours produce, which is concerned about safety. There is absolutely no reason why the engineers, who work around electric motors and moving machinery, should have to work seven (7) days per week, twelve (12) hour per day. The incentive to employer to bring on additional engineers and cut down on the number of hours is lost if the exemption applies.

The only logical difference between the processing barge and a onshore processing plant, which has lost its exemption under the repeal of 13(b)(4), is the fact that the barge floats on water in close proximity to land. To interpret the FLSA to include this barge in the concept of "at sea" is not founded

on any of the CFR interpretations, particularly 784.130.

For these reasons the writ should be denied.

Respectfully Submitted,



Carson F. Eller
Attorney for Respondents

PETITIONER'S

BRIEF

No. 85-195

In The
Supreme Court of the United States
October Term, 1985

ICICLE SEAFOODS, INC.,
an Alaska corporation,

Petitioner,

v.

LARRY WORTHINGTON, individually,
ROGER CAMERON, individually,
DAVID DAVEY, individually, and
GERALD KENT, individually,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals was correct in applying a *de novo* standard of review for ultimate and subsidiary issues of fact in determining whether employees are "seamen" who are therefore exempt from the overtime provisions of the Fair Labor Standards Act.

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CITATION TO THE OPINIONS BELOW

The Amended Opinion of the Court of Appeals in *Worthington v. Icicle Seafoods, Inc.* (Pet. App. A-1) is reported at 749 F.2d 1409. The decision of the district court (Pet. App. A-3) is not reported.

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STATEMENT OF JURISDICTION

Under review is the judgment of the Ninth Circuit Court of Appeals entered on April 1, 1985. That judgment was issued on a petition for rehearing, submitted January 9, 1985, of the judgment entered on December 27, 1984. The petition for a writ of certiorari was filed on June 28, 1985 and was granted on October 15, 1985. The statutory provision conferring jurisdiction is 28 U.S.C. § 1254(1).

o

STATUTES AND REGULATIONS

The full pertinent text of relevant statutes and regulations appears in the Appendix to the Petition for Certiorari (Pet. App. A-4).

The exemption for "seamen" from the overtime provisions of the Fair Labor Standards Act is found at 29 U.S.C. § 213(b) (6). which provides:

> "The provisions of Section 207 of this title shall not apply with respect to . . . (6) any employee employed as a seaman; . . ."

The interpretative regulations of the Administrator of the Wage and Hour Division with respect to the "seaman" exemption are found at 29 C.F.R. § 783.24-783.51.

———o———

STATEMENT OF THE CASE

Plaintiffs sued their employer, Defendant Icicle Seafoods, Inc., claiming they were denied overtime pay due them under the Fair Labor Standards Act ("FLSA"). The District Court ruled that the Plaintiffs were not entitled to overtime pay because (among other grounds) an exemption from the FLSA's overtime requirements (29 U.S.C. § 213(b)(6)) applied to them as "seamen."

The four Plaintiffs were members of the engineering department aboard the *ARCTIC STAR*, a sea-going seafood-processing barge. The *ARCTIC STAR* was not self-propelled. Towed by a tugboat, the *ARCTIC STAR* moved from place to place in the waters off Alaska and Washington, processing seafood while moored and transporting cargo and personnel while underway. (PTO Admitted Fact No. 2; Finding of Fact No. 2, Pet. App. A-3, pp. 2-3, R. 102-06.)

When a commercial fishing season closed in one area, the *ARCTIC STAR* would voyage to another area where a commercial fishing season was open. The *ARCTIC STAR* would anchor at sea near or on the fishing grounds and receive deliveries from a precommitted fleet of fishing vessels and tenders. (Findings of Fact Nos. 4 and 5, Pet. App. A-3, pp. 3-4.)

The processing on board was performed by workers in the processing department whose only work was processing seafood. As members of the engineering department, the Plaintiffs were separate and distinct from the processors and did no processing. Their job was to maintain all vessel systems and related equipment for power, electricity, life support, refrigeration, hydraulics, etc., to insure the continuous operation of the vessel, whether moored or underway. (Findings of Fact No. 7; Pet. App. A-3, pp. 5-7; R. 172, 174-75, 126-29, 131-36, 111-13).

After hearing testimony as to their duties, the trial judge found that the Plaintiffs were members of the ship's crew performing the job normally expected of Coast Guard licensed marine engineers. The trial judge found the Plaintiffs' work was maritime in nature and that they were "seamen":

> "As members of the Engineering Department, Plaintiffs were responsible for maintaining all systems for support and continuous operation of the vessel while at moorage or underway. Although working in shifts, the Plaintiffs had to be available on call 24 hours a day to perform work at a moment's notice if necessary to keep the vessel operating. Even though the Plaintiffs were not licensed by the Coast Guard as engineers or members of an engineering department, each of the Plaintiffs performed tasks which conformed to those expected of Coast Guard licensed personnel. The very description of the Plaintiffs' work is that of a marine engineer or member of an engineering department. In summary, each of the Plaintiffs were members of the crew of the ARCTIC STAR and performed work which was maritime in character and rendered while the ARCTIC STAR was in navigable waters. Each of the Plaintiffs employment was that of a seaman." (Finding of Fact No. 7, Pet. App. A-3, pp. 5-7).

The Court of Appeals reversed the District Court's ruling on the seaman exemption by substituting new subsidiary and ultimate fact findings without determining that the trial judge's findings had been clearly erroneous in view of the record. The Court of Appeals' new findings contradicted the trial judge's subsidiary findings as well as her ultimate fact finding. The Court of Appeals' new findings were that the Plaintiffs' work was not essentially maritime and they were not "seamen":

> "[T]he appellants primarily monitored, maintained and repaired the processing machinery and electric power generators. Although some of their work may have been of a maritime character, the dominant employment was industrial maintenance. The maritime work was incidental and occasional, taking but a small portion of the work time.
>
> "We conclude that these employees, while working on a barge anchored in navigable waters, are principally employed not as exempt seamen but as industrial maintenance employees. Because the determination of 'seamen' status under the FLSA is one of law, *cf. Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1189, n.11 (5th Cir. 1979) (definition of 'employee' under FLSA is a legal determination), we substitute our determination for that of the District Court." (Pet. App. A-2, pp. 10-11.)

On petition for rehearing *en banc*, Icicle Seafoods asserted that the appellate panel had erred by applying a *de novo* rather than "clearly erroneous" standard in reviewing the fact finding that Plaintiffs' employment was maritime in character and that of "seamen." The Court of Appeals responded by denying the petition for rehearing *en banc*, withdrawing its previous opinion, which had been designated for publication, and substituting a new opinion.

In the amended opinion, the Court of Appeals dropped the last sentence quoted above, which justifies substitution of its own determination. The remainder of the new fact findings, however, appeared in the amended opinion without change. (Pet. App. A-1, pp. 14-15). Although acknowledging a role for restricted "clearly erroneous" review in FLSA exemption cases, and softening its stated insistence on the right to substitute its own interpretation of the facts for the trial court's, the Circuit Court persisted in its interpretation of the evidence (that the Plaintiffs' duties were principally industrial, not maritime). This reinterpretation of the facts remained decisive in the amended opinion.

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SUMMARY OF ARGUMENT

I. The Court of Appeals mistakenly believed it was free to review *de novo* the District Court's determination that the Plaintiffs were exempt "seamen," substituting its own interpretation of the record. The trial court's determination of ultimate and subsidiary issues of fact should have been accepted by the Court of Appeals unless "clearly erroneous."

If the District Court's interpretation of the evidence is plausible in light of the record, the Court of Appeals may not reverse the trial court even though convinced it would have weighed the evidence differently. *Anderson v. Bessemer City*, 470 U.S. —, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985). If the District Court's findings had been based upon a misunderstanding of the law, the findings could have been set aside by the Circuit Court. *Pullman-Standard v. Swint*, 456 U.S. 273, 72 L. Ed. 2d 66, 102 S. Ct. 1781

(1982). However, it is not an erroneous view of the law with which the Court of Appeals took issue, but with the trial court's evaluation of the evidence.

Determining whether an employee's duties qualify him as a "seaman" within the FLSA exemption is the type of question historically treated by this Court as essentially a factual determination by the trial court, and entitled to deference as such. *Walling v. General Industries Company,* 330 U.S. 545, 91 L. Ed. 1088, 67 S. Ct. 883 (1947). By substituting its own interpretation of the evidence — that Plaintiffs' duties were principally industrial maintenance rather than maritime — the Circuit Court usurped the function of the District Court.

II. The trial court correctly determined that the Plaintiffs are exempt from the FLSA as "seamen" under 29 U.S.C. § 213(b)(6). On the record before the Appellate Courts, it cannot be said that the trial judge's conclusions are clearly erroneous; therefore, the judgment of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

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ARGUMENT

I. The Court of Appeals Erred in Substituting its Own Interpretation of the Evidence for the Trial Court's Determination that Plaintiffs Are Members of the Ship's Crew Performing Maritime Duties (Supporting "Subsidiary Facts") and, as such, are "Seamen" (an "Ultimate Fact").

A. The Court of Appeals Should Have Applied the Established "Clearly Erroneous" Standard to Review the Applicability of an FLSA Exemption.

The Ninth Circuit's asserted freedom to substitute its own determination for those of the trial court, claiming

independence from the more deferential "clearly erroneous" standard of review, is contrary to the governing Supreme Court rule for reviewing FLSA exemption determinations.

The deferential standard of review, which requires affirmance of supportable trial court determinations that particular workers are exempt from the FLSA, can be traced back to *Walling v. General Industries Co.,* 330 U.S. 545, 91 L. Ed. 1088, 67 S. Ct. 883 (1947). In that case, this Court upheld a trial court's findings that operating engineers in a manufacturing plant's powerhouse were exempt as "executive employees" from overtime pay provisions of the Act. This Court reversed the Court of Appeals' rejection of the trial court's findings, ruling that they should have been left undisturbed because they were not clearly erroneous.

The trial court had found the ultimate facts on which executive status, as defined by the regulations, depended. Concluding that the evidentiary facts afforded an adequate basis for the inferences drawn by the trial court in making the ultimate factual findings, the Supreme Court upheld the trial court, and reversed the Court of Appeals, because the trial court in drawing such inferences was not clearly wrong.

Walling v. General Industries Co. is the basis for the traditional Ninth Circuit rule on this point, the leading case being *Hoyt v. General Insurance Co. of America,* 249 F.2d 589 (9th Cir. 1957). That decision upheld a trial court's determination that a boiler inspector was exempt as an "administrative" employee, characterizing this as an "ultimate question of fact." The court ruled that such ultimate factual conclusions by the trial court are binding

upon an appellate court unless clearly erroneous, stating that "the authorities are uniform in holding that the question of whether an employee comes within one of the exemptions of the Act is an ultimate question of fact to be decided by the trier of the facts." 249 F.2d at 590. *Accord: Wainscoat v. Reynolds Electrical & Engineering Co., Inc.*, 471 F.2d 1157 (9th Cir. 1973) ("executive" exemption); *Cobb v. Finest Foods, Inc.*, 755 F.2d 1148 (5th Cir. 1985) ("executive" and "administrative" exemptions; whether employee is exempt is "primarily a question of fact"); *cf. Vicksburg Firefighters Association v. City of Vicksburg, Mississippi*, 761 F.2d 1036 (5th Cir. 1985) (whether fire department captains were "supervisors," properly excluded from union representation, is a finding of fact).[1]

B. The Circuit Court's Asserted Freedom to Weigh the Evidence De Novo Is Inconsistent with Recent Interpretations of the Standard of Review by This Court.

Appellate courts review the proceedings in trial courts to determine whether, as a matter of law, the findings sustain the judgment, and, when the appeal challenges those findings, they are not (except in rare circumstances)[2] set aside unless "clearly erroneous." Fed. R. Civ. P. 52(a). Findings are not set aside as "clearly erroneous" unless the only reasonable interpretation allowed by the record is contrary to the trial court's determinations.

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[1]Contrary cases are cited in the opinion below, Pet. App. A-1.

[2]*See Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984).

Recent opinions of this Court have emphasized the difference in the roles of the trial courts and the reviewing Courts of Appeals. Most recent is *Anderson v. Bessemer City*, 470 U.S. —, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985), in which this Court in strong terms disapproved reversing trial courts simply because reviewing courts are convinced they would have decided the case differently:

> "This [clearly erroneous] standard plainly does not entitle a reviewing court to reverse the finding of the trier of facts simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. . . . Appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. (Citations omitted.)"

84 L. Ed. 2d at 528.

The Court of Appeals in this case appears to have believed that its freedom to substitute its own interpretation of the record is greater where the trial court's findings do not rest on credibility determinations. However, as *Anderson* reaffirms, 84 L. Ed. 2d at 528-29, it is not only when trial court findings are based on credibility determinations that they are entitled to deference. The trial judge's better position to evaluate credibility is not the sole reason for deferring to the factfinder's interpretation of the evidence, including both "ultimate" and "subsidiary" deter-

minations. An additional consideration is that the trial judges and appeals courts have different roles in the legal process:

> "Duplication of the trial judge's efforts in the Court of Appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to the case on appeal have already been forced to concentrate their energy and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much."

84 L. Ed. 2d at 529. Other negative consequences of excessive involvement of appellate courts in the fact-finding process include the tendency to encourage appeals for a "second bite of the apple," the decreasing likelihood of settlements if the trial becomes instead a "trial run," and the loss of public esteem of our trial courts. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous" Rule Being Avoided?*, 59 Wash. U. L. Q. 409, 426-28 (1981).

C. In This Case, the Court of Appeals Impermissibly Rejected the Trial Court's Evaluation of the Evidence and Substituted Its Own.

If a District Court's findings have been based on a misunderstanding of the law, the findings may be set aside by the Circuit Court. In such an event, unless the record allows only one reasonable resolution of the fact issues, the case should be remanded for additional fact-finding under the correct legal standard. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92, 72 L. Ed. 2d 66, 81, 102 S. Ct. 1781 (1982). However, it is not an erroneous view of the

law with which the Court of Appeals took issue in this case, but with the trial court's evaluation of the evidence.

It is important to recognize that the Ninth Circuit panel has freely substituted its reading of the evidence for that of the trial judge, in drawing its own conclusion that the Plaintiffs were principally employed not as exempt seamen but as industrial maintenance workers. This conclusion was based on the panel's own determination that "although some of their work may have been of a maritime character, the dominant employment was industrial maintenance. The maritime work was incidental and occasional, taking but a small portion of the work time. We conclude that these employees . . . are principally employed not as exempt seamen but industrial maintenance employees." 749 F.2d at 1412. This plainly ignores the trial court's determination that Plaintiffs were employed as marine engineers and members of the vessel's crew "and performed work which was maritime in character . . . rendered while . . . in navigable waters. Each of the Plaintiffs' employment was that of a seaman." (Finding of Fact No. 7, Pet. App. A-3, pp. 5-7.)

To conclude, as the Circuit Court did, that the Plaintiffs' "maritime work was incidental," and that the "dominant employment was industrial maintenance," is simply to substitute one interpretation of the evidence for another. The Circuit Court did not announce a new standard for determining whether an employee is a "seaman" for FLSA exemption purposes. For instance, it did not redefine "seamen" as a category excluding engineers who are nor-

mally considered part of a vessel's crew.[3] Nor did the Ninth Circuit's reversal involve reevaluating whether undisturbed factual determinations by the trial court satisfied the statutory standard. What happened in this case is that the Ninth Circuit reinterpreted the evidence and reached its own factual conclusions.

If the Ninth Circuit felt that the factual findings of the trial court, made after weighing all the evidence, were unsupported by the record and therefore "clearly erroneous," then that should have been the issue the panel addressed. Its role was to assess whether the evidence in the record supported the trial court's determination that Plaintiffs' work was maritime in nature. Instead, what the Ninth Circuit did was substitute its own interpretation of the primary duties of the Plaintiffs.[4] In approaching review of the case with such independence, the panel applied the wrong standard of review.

II. The Trial Court Correctly Determined that the Plaintiffs Are Exempt From the FLSA as "Seamen" Under 29 U.S.C. § 213(b)(6). On the Record Before the Appellate Courts, It Cannot Be

[3]By regulation, the Wage and Hour Administrator interprets the term "seamen" to include customary crew members including engineers. 29 C.F.R. § 783.32 (Pet. App. A-4, p. 13). The District Court entered a finding that the tasks performed by the Plaintiffs were identical to the tasks expected of a Coast Guard licensed marine engineer or a Coast Guard licensed member of an engineering department.

[4]If the Ninth Circuit believed the trial court had not entered a fact finding on whether the Plaintiffs' work was *"principally* maritime," the case at the very least should have been remanded to the trial court. *Pullman-Standard v. Swint,* 456 U.S. 273, 291-92, 72 L. Ed. 2d 66, 81, 102 S. Ct. 1781 (1982).

Said that the Trial Judge's Conclusions are Clearly Erroneous; Therefore, the Judgment of the Court of Appeals Should be Reversed, and the Judgment of the District Court Reinstated.

FLSA overtime pay requirements do not apply to "any employee employed as a seaman." 29 U.S.C. § 213 (b)(6). Crew members on board a vessel are generally "seamen." Although his interpretations of the FLSA are not binding on the courts, 29 C.F.R. § 784.5, the Wage and Hour Administrator interprets the term "seamen" to include customary crew members, including engineers:

> "The term 'seamen' includes members of the crew such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards . . ."

29 C.F.R. § 783.32.

The courts have agreed with this interpretation, finding that engineers employed on vessels in the Alaska seafood industry are "seamen" excluded from FLSA overtime pay requirements. *Pratt v. Alaska Packers,* 84 F. Supp. 891 (N.D. Cal. 1949).

Naturally, exclusion as a "seaman" depends on an employee's job duties, not on his title as "engineer." Whether the worker's duties are principally of a maritime character, is the question. *Bailey v. Pilots' Association for Bay & River Delaware,* 406 F. Supp. 1302, 1307 (E.D. Pa. 1976).

If, despite his job title, an employee in reality is not a member of the ship's crew and is not responsible for its operating as a vessel, his work is not maritime and he is not employed as a "seaman." Thus, miners who work on a barge are not "seamen" just because they do their min-

ing work afloat. *Walling v. W. D. Haden Co.*, 153 F.2d 196 (5th Cir. 1946). Likewise, courts have distinguished lab technicians and members of the scientific crew on oceanographic research vessels, from the vessels' engineers: the engineers are members of the crew and exempt as "seamen" because they aid in the operation of a vessel as a vessel. *Marshall v. Woods Hole Oceanographic Institute*, 458 F. Supp. 709 (D. Mass. 1978) (member of a scientific crew aboard a vessel did not perform any duties related to the vessel's maintenance or navigation); *Donovan v. Nekton, Inc.*, 703 F.2d 1148 (9th Cir. 1983) (technicians' primary duties were to operate and care for the scientific gear, not to maintain the vessel's machinery involved in its operation as a vessel).

In this case, the fact findings satisfy the legal definition of "seamen," meaning those who aid in the operation of a vessel as a vessel. The factfinder concluded that the Plaintiffs did not process fish at all. Rather:

> "Plaintiffs were responsible for maintaining all systems for support and continuous operation of the vessel while at moorage or underway. . . . [E]ach of the Plaintiffs performed tasks which conformed to those expected of Coast Guard licensed personnel. The *very description* of the Plaintiffs' work is that of a marine engineer or member of an engineering department. In summary, each of the Plaintiffs were members of the crew of the *ARCTIC STAR* and performed work which was maritime in character. . . ." (Emphasis added.) (Finding of Fact No. 7, Pet. App. A-3, pp. 5-7.)

The record of the three-day trial supports these fact findings. The Plaintiffs were members of the engineering department who did not operate the seafood processing

equipment. (PTO Admited Fact No. 2: R. 128 and 74.) The chief engineer, Plaintiff Cameron, admitted on direct examination that the engineer's job on board the *ARCTIC STAR* is the same as a marine engineer's job on board a Navy ship. (R. 23.) Other witnesses testified that Plaintiffs' job, in essence, was to stand watch and keep all systems operating 24 hours a day to insure continuous operation of the vessel as a vessel. (R. 172, 174-75, 126-29, 131-36, 111-13.) Plaintiff Cameron and another witness testified that the tasks Plaintiffs performed on the *ARCTIC STAR* were the same tasks required of a Coast Guard licensed Qualified Member of an Engineering Department. (R. 43, 45-47, 129-30; 46 C.F.R. 12.15-9.)

The ultimate fact finding that Plaintiffs were "seamen" follow from the subsidiary fact findings which are fully supported by the trial record. The trial judge's interpretation of the facts was not "illogical or implausible." *Anderson v. Bessemer City*, 84 L. Ed. 2d at 530. The judgment of the District Court should be reinstated.

—o—

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the judgment of the District Court reinstated.

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RESPONDENT'S

BRIEF

No. 85-195

In The

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October Term, 1985

ICICLE SEAFOODS, INC.,
An Alaska corporation,

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LARRY WORTHINGTON, individually,
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On Writ of Certiorari to the United State Court of Appeals for the Ninth Circuit

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SUMMARY OF ARGUMENT

The ultimate fact is the legal definition of "seaman", which is factual in origin, but legal in definition. It is mixed. Therefore the Appellate Court can review de novo. Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 86 S. Ct. 684, 15 L.Ed 2d 545.

The legal definition of "seaman", as found in CFR 783.31, and followed by the Court of Appeals, is not here for review.

Had the findings of fact and conclusions of law been drafted by the Respondent, they would have stated the Plaintiffs are exempt from overtime under 213(b)(6) and 213 (a)(5) because they are engineers who are subject to the perils of the sea, involved in the first processing of aquatic products, and performing work

similar to that expected of licensed Coastguard personnel.

These conclusions of law would then have been reviewable de novo under Graham, supra. The obvious answer would have been that they are not subject to the perils of the sea, they are not involved in the first processing of aquatic products because that is limited to the catcher vessel and the similarity of work to that of Coastguard personnel is totally irrelevant because a seaman definition depends upon the character of the work he actually performs and not on what it is called or the place where it is performed. CFR 783.33 (citations omitted).

In other words, excluding the reason for the exemption from the conclusion and placing them in the findings is a tacticle trick that should have been corrected by the trial judge.

ARGUMENT

Ultimate Fact

The question of ultimate fact as a legal concept did not originate in Bonnette v. California Health & Welfare Agency, 704 F.2d 1464 (9th Circuit 1983), but was instrumental in tracing the history of the concept. The Court stated in Bonnette, supra, at 1469:

> "In FLSA cases, although it has not explicitly discussed the standard of review, the Supreme Court appears to treat the ultimate question of whether a party is an 'employer' as a legal issue. See Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961); Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed 1772 (1947).

More recent cases discussing ultimate fact are Pullman-Standard, a Division of Pullman, Incorporated v. Swint, 456 U.S. 273, 72 L.Ed 2d 66, 102 S. Ct. 1781, where the word "intent" was the

ultimate fact, the Court made it very clear that facts are not divided into "ultimate" and "subsidiary".

The Court of Appeals in the case at bar, on Page 4 of its opinion, recognized early that "The standard of review of exemptions under the FLSA is not clear".

Petitioner's citations of authority, Hoyt v. General Insurance Co. of America, 249 F.2d 589 (9th Cir. 1957), is superseded by Pullman, supra. Although Pullman, supra, destroys the "ultimate fact", it does recognize the difficulties created by 52(a) when the Court stated:

> "Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion."

Bose Corporation v. Consumers Union of United States, Inc., 466 U.S. 485, 80 L.Ed 2d 502, 104 S. Ct. 1949 (1984), was in existence at the time of the 9th Circuit's opinion, and it was quoted under the "at sea" first processing exemption portion of the appeal.

United States v. McConney, 728 F.2d 1195, 1202, (9th Cir.) (en banc), cert. denied, 105 S. Ct. 101 (1984), held "ultimate fact" usually heard de novo.

Is the Definition of Seaman Factual and Thus Subject to the "Clearly Erroneous" Rule?

A definition of "employer" was a legal issue in Bonnette, supra, although this was a Circuit Court opinion, it did rely on Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 81 S. Ct.

933, 6 L.Ed 2d 100 (1961); and Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed 1772 (1947). Bose, supra, avoided the agony of having to decide if actual malice was a factual question or a legal one by finding it a constitutional question and justifying a complete review of the District Court's findings. Apparently in constitutional questions the District Court cannot be totally trusted with such important matters. The word "intent" was, of course, the word of concern in Pullman, supra. There intent was found to be factual, citing Commissioner v. Duberstein, 363 U.S. 278, 4 L.Ed 2d 1218, 80 S. Ct. 1190 (1960), and United States v. Yellow Cab Co., 338 U.S. 338, 94 L.Ed 150, 70 S.Ct. 177 (1949). (An anti-trust

case hinging on intent.)

Is the Definition of "Seaman" a Mix Question of Law and Fact?

It is well accepted that the Court of Appeals is not bound by the District Court's conclusions of law. Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 86 S.Ct. 684, 15 L.Ed2d 545.

Pullman, supra, also agreed that a view of conclusions of law is not governed by Rule 52, and went on to state:

> "The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis."

That therefore raises the question, was the District Court's definition of the word "seaman" an erroneous view of the law? This analysis requires a close look at the definition of "seaman", its origin, its history, and its

application.

CFR 783.29 in tracing the legislative history and judicial construction of exemptions gave the phrase "employee employed as a seaman",

> "...its commonly accepted meaning, namely, one who is aboard a vessel necessarily and primarily in aid of its navigation. (Walling v. Bay State Dredging and Contracting Co., 149 F.2d 346; Walling v. Haden, 153 F.2d 196; Sternberg Dredging Co. v. Walling, 158 F.2d 678."

One or all of these citations were included in the trial briefs submitted to the District Court at the time of trial.

CFR 783.31 gives the criteria for employment "as a seaman" by stating:

> "an employee will ordinarily be regarded as 'employed as a seaman' if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he

performs no substantial amount of work of a different character. This is true with respect to vessels navigating inland waters as well as ocean-going and coastal vessels. (Sternberg Dredging Co. v. Walling, 158 F.2d 678, Walling v. Haden, 153 F.2d 196, certiorari denied 328 U.S. 866; Walling v. Great Lakes Dredge & Dock Co., 149 F.2d 9, certiorari denied 327 U.S. 722."

CFE 783.33 states that:

"Whether an employee is 'employed as a seaman', within the meaning of the Act, depends upon the character of the work he actually performs and not on what it is called or the place where it is performed (Walling v. Haden, 153 F.2d 196; Cuascut v. Standard Dredging Corp., 94 F. Supp. 197). Merely because one works aboard a vessel (Helena Glendale Ferry Co. v. Walling, 132 F.2d 616; Walling v. Bay State Dredging & Contracting Co., 149 F.2d 346), or may be articled as a seaman (see Walling v. Haden, supra), or performs some maritime duties (Walling v. Bay State Dredging & Contracting Co., 149 F.2d 346; Anderson v. Manhattan Lighterage Corp., 148 F.2d 971) one is not employed as a seaman within the meaning of the Act unless one's services are rendered primarily as an aid in the operation of the

> vessel as a means of transportation, as for example services performed substantially as an aid to the vessel in navigation."

Findings of Fact signed by the District Court, No. 7, makes no mention of the Plaintiff's aiding in the navigation of the barge. There is no explanation of how a non-motorized barge can be navigated, nor is there any explanation as to how a non-motorized barge can be used as a means of transportation. This barge was used as a floating fish processor and no one aboard the barge, whether he be an engineer or an on-line processor, is a seaman. The closest anyone comes to being a seaman with this entire operation is the crew of the tug that occasionally pulls the barge from one location to another. This barge would often times set for many months in one place and was often times connected to shore for either partial

power or water source. Thus, Conclusions of Law, No. 2, and Findings of Fact, No. 7, is totally without basis and an obvious mistake in the law was made.

Conclusion of Law, No. 1, as pertains to 29 U.S.C. 213(a)(5), Findings of Fact, No. 4, Findings of Fact, No. 5, Findings of Fact, No. 6, are all based on incorrect interpretation of the law. CFR 784.118 states:

> "As indicated by the legislative history, the purpose of the section 13(a)(5) exemption is to exempt from the minimum wage and overtime provisions of the Act employment in those activities in the fishing industry that are controlled or materially affected by natural factors or elements, such as the vicissitudes of the weather, the changeable conditions of the water, the run of the catch, and the perishability of the products obtained. (83 Cong. Rec. 7408, 7443, S. Rep. No. 145 p. 33, on H.R. 3935, 87th Cong., first session; Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52; Walling v. Haden, 153 F. 2d 196, certiorari denied 328 U.S. 866.)"

CFR 784.120 explains with cited authorities the purpose of the 1961 amendment to the Act and the reason for removing from the exemption the so called on shore activities and leave the exemption applicable to offshore activities with the procurement of the aquatic products.

First processing, canning or packing, is covered by CFR 784.128 and the "at sea" found in 784.130 plainly dictate that a non-motorized barge is not "at sea".

> "On the other hand, one performing the named activities of first processing, canning, or packing within the limits of a port or harbor is not performing them 'at sea' within the meaning of the legislative intent although the situs of performance is subject to tidewaters."

CFR 784.131, entitled, "As an incident to, or in conjunction with" fishing operations.

"The statutory language makes clear that the 'first processing, canning, or packing,' unlike the other named operations of 'catching, taking, propagating, harvesting, cultivating, or farming', are not exempt operations in and of themselves. They are exempt only when performed 'as an incident to, or in conjunction with such fishing operations.' (See Farmers Reservoir Co. v. McComb, 337 U.S. 755).....

.....Therefore to be 'an incident to, or in conjunction with such fishing operations', the first processing, canning, or packing must take place upon the vessel that is engaged in the physical catching, taking, etc., of the fish. This is made abundantly clear by the legislative history. (Emphasis added.)

In Senate Report No. 145, 87th Congress, first session, at page 33, it pointed out:

"For the same reasons, there was included in section 13(a)(5) as amended by the bill an exemption for the 'first processing, canning, or packing' of marine products "at sea as an incident to, or in conjunction with such fishing operations.' The purpose of this additional provision is to make certain that the Act will be

uniformly applicable to all employees on the fishing vessel including those employees on the vessel who may be engaged in these activities at sea as an incident to the fishing operations conducted by the vessel.

In accordance with this purpose of the section, the exemption is available to an employee on a fishing vessel who is engaged in first processing fish caught by fishing employees of that same fishing vessel; it would not be available to such an employee if some or all of the fish being first processed were obtained from other fishing vessels, regardless of the relationship, financial or otherwise, between such vessels (cf. Mitchell v. Hunt, 263 F.2d 913; Farmers Reservoir Co. v. McComb, 337 U.S. 755).

It appears that the petitioner in drafting his findings per the instruction of the Court, particularly Findings 5 and 6, that the language therein were copied from CFR 784.131. The above CFR quotations, many parts of which are supported by well entrenched legal

precedent, make a fallacy out of the following findings of fact that led to the legal conclusion that Plaintiff's were seaman; Finding No. 4:

> "The first processing or packing occurring on board the ARCTIC STAR was performed at sea while subject to the perils of the sea."

This portion of Finding No. 4 is not in accord with CFR 784.131.

Finding No. 4, Page 3, Line 3:

> "The first processing or packing occurring on the ARCTIC STAR was not the equivalent of an on-shore processing or packing enterprise. The first processing or packing was an off-shore operation subject to the perils of the sea and conducted at sea."

This portion is not in accord with CFR 784.132.

Finding No. 5:

> "The first processing or packing occurring on the ARCTIC STAR was in conjunction with and in close cooperation with the catching, taking, or harvesting of the fish or shellfish by other vessels working with the ARCTIC STAR."

This finding attempts to twist the facts to fit the law, particularly, Section 213(a)(5), which is specifically interpreted by CFR 784.131, to mean those employees that are aboard the actual vessel that catches the fish.

Finding No. 6 is also intellectually dishonest, and does not meet the meaning of CFR 784.131.

Finding No. 7, the last sentence, states:

> "Each of the Plaintiffs employment was that of a seaman."

This conclusions is drawn from the language in Finding No. 7 describing the Plaintiffs as maritime engineer and their work as marine engineers, and as their work is maritime in character, performed in navigable waters. At no place in the FLSA nor CFR does navigable waters have

any significance on the definition of seaman, in fact, to the law is to the contrary.

At no place in the petitioner's findings which were prepared by the petitioner at the request of the District Court, does the findings explain how the Plaintiffs were engaged as an aid to navigation on board a vessel that is used for transportation. Without these essential ingredients, they cannot and never will be seaman.

The Court of Appeals was forced to examine the entire record, allowed by Bose, supra, when a careful reading of the findings of fact that led to the conclusions were obviously inconsistent, i.e., the finding that plaintiff's were seaman was not supported by the findings that described the working place, the

location of the barge, the stationary position of the barge, and in a negative vain, the fact that it was not used for transportation, and the plaintiffs were not aiding in its navigation.

The last sentence in Finding No. 7, which states:

> "Each of the Plaintiffs employment was that of a seaman."

is identical to the conclusions of law, and therefore creates a mixture of law and fact. Once this has been determined, then the standard of review is clear.

Is the Standard of Review Different Where the Findings Were Not the Original Product of a Disinterested Mind?

The "clearly erroneous" portion of Rule 52 has overshadowed other pertinent portions of the Rule that have drawn little attention. Those portions state:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, ---"

Further down in the Rule it states:

"It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court."

Both quoted portions of Rule 52 set forth were violated by the District Court.

The 4th Circuit in E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633 (1983) commenting on the holding in U.S. v. Crescent Amusement Co., 323 U.S. 173, 65 S. Ct. 254, 89 L.Ed 160 (1944), where they stated that:

"the adoption of 'findings (proposed by one of the parties to

> the suit and adopted by the trial judge) leave much to be desired in light of this function of the trial court,' under the Rules. This is so because an appellate court will 'feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered' when factual findings were not the product of personal analysis and determination by the trial judge."

The same decision quoting Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977):

> "after observing that 'the district court (had) adopted (in that case) without change findings of fact and conclusions of law prepared by the defendant,' said: '(a) critical view of a challenged finding is appropriate where, as here, the findings of fact and conclusions of law of which it is a part were not the original product of a disinterested mind.'"

In the case at bar, the defendant was instructed to prepare the findings and no change was made by the court. Proposed findings by the losing party, if

presented, would not be reviewable, per the Rules, by the Court of Appeals, and therefore none were submitted. It is not suggested, nor do the cases support the theory that such a violation should entitle the losing party to reversal, it does give the Court of Appeals an opportunity to "examine the findings more narrowly", Shlensky v. Dorsey, 574 F.2d 131 (3rd Cir 1978), and:

> "Verbatim adoption of proposed findings of fact by the district court ... calls for close scrutiny by an appellate court."
>
> United States v. State of Wash., 641 F.2d 1368 (9th Cir. 1981) cert. denied, 454 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed. 2d 294.

This violation of the Rule in and of itself probably would not explain why the Court of Appeals chose the de novo

method of review, but it does help to explain and/or give further explanation as to the frustration obviously encountered by the 9th Circuit Court of Appeals on a question of mixed fact and law.

Anderson v. Bessemer City Distinguished

The Anderson v.Bessemer City's, 84 L.Ed 2d 518, trial judge was faced with weighing the evidence on such things as the broad responsibility for creating and managing a recreational program, the athletic activities involved, the activities for senior citizens and activities for young people, and in weighing this evidence looked at the background of the applicants, his age, experience and involvement in civic affairs.

What the record did not show, that a good trial lawyer recognizes

immediately, are the character traits of the witnesses that do not appear on the record, i.e., (1) attitude of the witness; (2) the enthusiasm or lack of it of the witness; (3) their dress; (4) personal appearance; (5) promptness in appearance; (6) intelligence; (7) support by friends of relatives. None of these appear of record and a trial judge who has "breathed the atmosphere of the courtroom" justifies the creation of the "clearly erroneous" rule.

There was some reference in Anderson, supra, to the courtroom atmosphere, i.e., testimony of the applicant's wife, etc.

Attempts to get around the harshness of the clearly erroneous rule is found in all the cases cited by both parties through their petitions.

1) Bose, supra, got around it by making it a constitutional question.

2) Pullman, supra, tried to get around it by using the "ultimate facts" gimmick, but did not make it.

3) Bonnette, supra, escaped the rule by making "employer" a legal question.

In Worthington v. Icicle Seafoods, Inc., 749 F.2d 1409 (9th Cir. 1984), the trial judge was faced with the decision whether the Plaintiffs were exempt from overtime pay under the FLSA by looking at the following facts:

1) Where did the work take place, i.e., on a motorized fishing vessel, an "onshore" plant, or a floating barge;

2) The type of work performed, i.e., welding (Worthington), electrical (Davies); engine repair (Cameron), or aid in navigation of the barge.

3) The use of the barge as a means of transportation, or the perils of the sea (definition of which is limited to the catching

vessel) on a barge anchored in protective waters;

4) Duties of a coastguard employee of a comparable nature on a self-propelled vessel.

The facts in Worthington, supra, could have been stipulated.

Thus, the distinction is Anderson, supra, and Worthington, supra, is clear. The trial judge was not faced with the demeanor of testimony. Demeanor of testimony appears to be a weighing factor in many of these citations. Moore on Federal Practice, Volume 5, devotes thirteen pages of citations involving "non-demeanor testimony". Of those citations the conclusion is reached that they lean toward a de novo standard of review.

CONCLUSION

Justice Frankfurter in McAllister v. United States, 348 U.S. 19, summed up this respondent's opinion by stating:

> "Again and again and again has it been authoritatively announced that controversies such as this are not for this Court. Nor does it follow that because the case in fact was brought here and has been argued, the merits should be decided. The short answer is that to entertain this kind of a case inevitably will encourage petitions for certiorari in other like cases tendering an issue of more general importance which close examination proves wanting."

Quoting Chief Justice Taft who wrote the opinion, Justice Frankfurter went on to state:

> "...'the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority

> between the circuit courts of appeal. The present case certainly comes under neither head.'" Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed 712, 714, 43 S. Ct. 422.

It appears the health, safety and welfare of four mechanical engineers, having worked with and around machinery twelve hours per day, seven days per week, has been totally lost in the maze of procedural niceties. No one can deny that the spirit of the FLSA is totally lost when men are required to work under these conditions with no incentives by their employer to correct them.

Denial of certiorari by this court on the question of "seaman" leads to the conclusion that the Court of Appeals in the 9th Circuit was correct in their anaylis of that subject, but it is feared

that the baby will get thrown out with the bathwater because of the uncertainties on the question of the standard of review.

Respectfully Submitted,

Carson F. Eller
Attorney for Respondents

REPLY

BRIEF

No. 85-195

In The
Supreme Court of the United States
October Term, 1985

ICICLE SEAFOODS, INC.,
an Alaska corporation,
Petitioner,

v.

LARRY WORTHINGTON, individually,
DAVID CAMERON, individually,
DAVID DAVEY, individually, and
GERALD KENT, individually,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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I. The Trial Court Was Reversed for Arriving at What the Court of Appeals Thought Was An Erroneous Finding That the ARCTIC STAR's Marine Engineers Were Employed Primarily as Seamen Performing Maritime Duties. Whether the STAR's Engineers Primarily Performed Maritime Duties or Industrial Maintenance Work, as the Court of Appeals Thought, Is a Question of Factual Interpretation, Not a "Question of Law" nor a "Mixed Question of Law and Fact," Reviewable De Novo, as Contended by the Respondents.

The FLSA does not define "seaman." The term has been interpreted in regulations by the Wage & Hour Administrator and by the courts. Both the District Court and the Court of Appeals applied these interpretations but reached different conclusions. If this disagreement stemmed from differing legal interpretations of the statutory term "seaman," the Court of Appeals would be free to disregard the District Court's definition and apply its own. But if the disagreement is with the District Court's interpretation of the facts, the Court of Appeals was required to defer to the trial court's conclusions unless they were clearly erroneous. Respondents contend that conclusions of law, or mixed conclusions of law and fact, were reversed upon review, therefore the Ninth Circuit correctly substituted its judgment for the trial court's. Whether the Court of Appeals was free to make such a substitution is the dispositive issue of the case.

According to the Administrator and the courts, one is not a "seaman" for FLSA purposes just because he

works aboard a vessel. For example, bargehands whose primary duties are loading and discharging cargo are not "seamen." Workers aboard a barge which is not self-propelled, such as the ARCTIC STAR, may or may not be "seamen," depending upon their duties. Whether an employee is primarily one who performs maritime services as a seaman, or is in reality a floating stevedore (or industrial maintenance worker), is a question of fact:

> "Whether an employee is on board a vessel primarily to perform maritime services as a seaman or loading or unloading services typical of such shore-based personnel as longshoremen is a question of fact and can be determined only after reviewing the facts in the particular case."

29 C.F.R. § 783.36.

The term "seaman" is interpreted to include customary crew members, including engineers. 29 C.F.R. § 783.32; *Pratt v. Alaska Packers,* 84 F. Supp. 891 (N.D. Cal. 1949). However, exclusion as a "seaman" depends on an engineer's job duties, not his title. Whether his duties are principally of a maritime character is the issue. *Bailey v. Pilots' Association for Bay & River Delaware,* 406 F. Supp. 1302, 1307 (E.D. Pa. 1976). If in reality an employee is not a member of the ship's crew and is not responsible for its operating as a vessel, his work is not maritime and he is not employed as a "seaman." Thus, it has been held that miners who work on a barge are not "seamen" just because they do their mining work afloat, and technicians whose primary duties are to operate and care for scientific gear aboard a research vessel, not to maintain the vessel's seaworthiness or its operation as a vessel, are part of the scientific crew and not part of

the "ship's crew." And, where the dominant employment is clearly industrial in character and work of a maritime nature only incidental or occasional, the employee is not a seaman within the meaning of the exemption. *Cuascut v. Standard Dredging Corp.,* 94 F. Supp. 197 (P.R.R. 1950).

On the other hand, seamen who are doing repair work on a ship during the off-season are still seamen during the moorage, *Walling v. Keansburg Steamboat Co.,* 162 F.2d 405 (3d Cir. 1947). As noted in that opinion, the cases holding employees are not seamen although working aboard a ship are cases finding that the work of the employees concerned was primarily not of a maritime character. For example, in *Walling v. W. D. Haden Co.,* 153 F.2d 196 (5th Cir. 1946), workers aboard a dredge boat (engaged in dredging oyster shell deposits for use in cement and concrete) were held not to be "seamen," because "the dominant employment is clearly the industrial one, the production of shells. The maritime work is incidental and occasional, taking but a small fraction of the worktime." 153 F.2d at 199. Similarly, cashiers on a floating barge attached to the shore by cables were not "seamen," *Helena Glendale Ferry Co. v. Walling,* 132 F.2d 616 (8th Cir. 1942). Whether a person is a seaman depends on his duties: if they are maritime in character aboard a vessel in navigable waters, he is a seaman. Thus, a barge tender aboard a barge which is towed has been held to be a "seaman," *Gale v. Union Bag & Paper Corp.,* 116 F.2d 27 (5th Cir. 1940).

As illustrated by this review of FLSA "seaman" cases, the legal standard is not in any doubt. Numerous interpretations by the courts and the Administrator established that a "seaman" is someone aboard a vessel

primarily to perform maritime services, as distinguished from a sea-going stevedore, miner, scientist, clerk, or industrial repairman. The trial court found the ARCTIC STAR's engineers' primary duties were to perform maritime services as seamen; the Ninth Circuit disagreed, finding they primarily were industrial maintenance employees . . . seagoing equipment repairmen, in other words.

Is this debate between the trial and appellate courts a disagreement on a question of fact or a dispute over a question of law? On the answer to this question depends the outcome of the case.

The answer is, a dispute over how to interpret the facts is involved. Like in *Pullman-Standard v. Swint*, 456 U.S. 273, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982), the Court of Appeals did not accuse the District Court of misunderstanding the definition of "seaman" for FLSA purposes. The District Court did not apply an erroneous definition of the term. The trial court correctly considered as the issue whether the ARCTIC STAR's engineers were members of the vessel's crew who performed work which was maritime in character. The Court of Appeals considered the same issue but concluded otherwise, that the maritime work of the engineers was incidental and occasional; their primary employment, according to the Court of Appeals, was not as seamen but as industrial maintenance employees. *Worthington v. Icicle Seafoods, Inc.*, 749 F.2d at 1412. In short, the disagreement is over whether only "some of their work (was) of a maritime character, (while) the dominant employment was industrial maintenance." 749 F.2d at 1412. The trial court answered that question no, the Court of Appeals answered

that question yes. Is that dispute over a legal question? Over a "mixed question of law and fact?" Or over a factual interpretation?

By contrast to the factual disputes still at issue, certiorari was not granted in this case on a second issue—one which does involve a "question of law." That dispute concerned whether a separate FLSA exemption—for workers involved in seafood processing "in conjunction with" fishing operations—applied. At issue was whether the Administrator's requirement that seafood processing occur aboard the same vessel catching the fish is a correct restriction on the definition of seafood processing "in conjunction with" fishing operations. There was no dispute that the seafood processing aboard the ARCTIC STAR was done aboard a separate vessel from the fleet catching the fish. If "seafood processing . . . in conjunction with fishing operations" applies only to vessels which both catch and process the fish, that exemption would not apply; if "in conjunction with" fishing operations also describes the ARCTIC STAR's processing of seafood for other vessels of the fleet which catch the fish, that exemption would have applied. The trial court did not accept the Administrator's restrictive interpretation, and therefore held the "seafood processing" exemption also applied. The Ninth Circuit accepted the Administrator's restriction, and there being no dispute that the ARCTIC STAR was processing fish caught only aboard other vessels, the Ninth Circuit's challenge to the trial court's conclusion involved a legal question, as to which the Court of Appeals could freely substitute its own interpretation.

However, a similar disagreement is not involved in the dispute between the courts below over application of

the "seaman" exemption. Here, the district court is faulted not for misunderstanding the legal definition of "seaman," but for arriving at what the Court of Appeals thought was an erroneous finding as to whether the dominant employment of the ARCTIC STAR's engineers was industrial maintenance or maritime. In determining which was dominant, the trial court was making factual determinations—what is the essential nature of what they do? They handle lines, repair the hull, keep power to the vessel, repair and maintain the vessel, and also do some maintenance on the production equipment. The trial court determined they do the same work as coastguard-licensed marine engineers. She found they are part of the ship's crew (not part of the production crew); they maintain the seaworthiness of the vessel; they operate the vessel as a vessel; the work they do is that of "marine engineers," whom the Administrator recognizes to be part of the ship's crew and therefore "seamen." In summary, the trial judge concluded that the work of the subject employees was "maritime" in nature and that their duties were those of "marine engineers" who are "seamen." The Court of Appeals drew its own conclusion that the plaintiffs were principally employed not as seamen.

Plainly this disagreement is not over a question of law. And it is submitted that it is not what might be termed a "mixed question of law and fact" (*Pullman-Standard v. Swint, supra,* 72 L. Ed. 2d at 80 n. 19), which would describe an appellate reversal involving reevaluating whether undisturbed factual determinations by the trial court satisfied a statutory standard. What has occurred in this case is that the Ninth Circuit has reinterpreted the evidence and reached its own factual conclu-

sions. In doing so, it reviewed the case with an independence not allowed by Rule 52.

II. Respondents' Apparent Contention That Engineers Operating a Non-Motorized Processor Barge Cannot Be "Seamen" Because the Barge Cannot Be Used as a "Means of Transportation" Is Premised Upon Too Narrow or Literal an Interpretation of How "Seaman" Is Defined.

In their brief, Respondents question how a processor which is not self-propelled can be "a means of transportation." As a matter of fact, the ARCTIC STAR plays a significant role in transporting cargo and personnel. The STAR (towed by a tug) transports the herring processing crew (70 to 80 workers) from Seattle to Alaska in March, and at the end of the salmon season in the fall, returns from Ketchikan to Seattle with the salmon crew aboard and 200,000 to 300,000 pounds of salmon in her hold, which is brought to Seattle, then trucked to a processing plant. While in Alaskan waters, the STAR sometimes moves from one location to another with product stored in her hold and the processing crew aboard. Supplies for the fishing fleet may also be aboard as cargo. On longer voyages, the processing crew is not aboard; then, the STAR moves with a "riding crew," meaning the engineers and deck crew. The engineers are aboard on these voyages to keep the vessel operating and seaworthy: Power must be maintained to run the generators, to provide light and ventilation inside, and to keep the running lights on. When product is stowed in the hold while under way, maintaining refrigeration is significant. The generators need to supply power to pump water out of the bilges, and to supply fresh water and light for living quarters. Inspec-

tion of the tow lines is the engineers' responsibility while under way, and at the beginning and end of the tow, they operate the cranes which hook up and release the tow cables, and they weigh and drop anchor. Except perhaps during the voyages to Sitka from Seattle and back to Seattle from Ketchikan, the transporting of processors and cargo within Alaskan waters, as described above, is today as it was during the time period involved in the lawsuit.

In short, the ARCTIC STAR does sometimes operate to transport cargo and passengers. However, while processing is occurring, she is anchored. But just because she is not then transporting cargo or processors does not mean that the STAR's engineers are not "seamen." It is too literal or narrow an interpretation of what is a "vessel" and who is a "seaman" to consider only the STAR's activities while transporting crew and cargo.

The *Gale* case, *supra,* and the Administrator's regulations themselves acknowledge that the crew on a non-motorized barge may be "seamen," depending upon whether their duties are maritime in nature, as discussed above. The regulations do speak of maritime duties as those related to a vessel operating as transportation. However, tracing this language back to the cases from which it is drawn by the Administrator demonstrates that a "seaman" is any worker whose duties are "primarily maritime" in character, performed aboard a vessel, including those occasions when the vessel in question is not exclusively or primarily a transport vessel. In context, it is evident the Administrator's intent was to express a distinction between members of the vessel's crew (who maintain and operate the vessel) from workers who are really engaged in dredging or other industrial operations which

are performed aboard the vessel. Closer examination of the court's opinion in *Walling v. W. D. Haden,* 153 F.2d 196 (5th Cir. 1946), relied upon by the Administrator, reveals the distinction being drawn was not between vessels which have transport duties and those which don't, but between employees who actually do the work of "seamen" (whose occupation is to assist in the management of ships at sea, 153 F.2d at 198) and non-maritime workers, who the court concluded, were "principally employed not as seamen but as shell miners. They are employed more in industry than in shipwork, and are not exempt." 153 F.2d at 199. The court there found that "the dominant employment is clearly the industrial one, the production of shells" . . . and not the portion of the job which "is of a nautical kind, having to do with the management of the dredge boat and barges as vessels." This was the distinction the court (and subsequently the Administrator's interpretation) was drawing: between work "of a nautical kind, having to do with the management of the dredge boat and barges as vessels" and "the mining and handling of shells as an industrial operation carried on by means of a floating mining plant." Finding there that the dominant employment was the industrial one (the production of shells), and that the maritime work was incidental and occasional, taking but a small fraction of the work time, the court concluded that the dredging crew aboard that company's dredge boat were primarily involved in the company's business of dredging oyster shell deposits from the ocean floor, and not in maintaining "the dredge boat and barges as vessels." 153 F.2d at 199.

This early expression of the distinction, later reiterated by the Administrator, is a more accurate way of

phrasing the distinction the Administrator intends to draw: The distinction is between workers who primarily are engaged in maintaining and operating the vessel *as a vessel,* and those who are engaged primarily in the industrial operation carried on aboard the vessel. Applying this dictinction to the case at hand, the ultimate question is whether the engineers aboard the ARCTIC STAR were primarily engaged in the industrial operation aboard the vessel (the processing of seafood) or were they primarily engaged in operating the vessel itself as a vessel. The trial court thought the latter, the Court of Appeals thought the former. Neither court thought the issue was whether the ARCTIC STAR qualifies as a "vessel" based upon the percentage of time it is transporting cargo and crew, as compared to the percentage of time it is at anchor processing the seafood.

It is true that the opinion of the Court of Appeals takes particular notice that the STAR is at anchor more than it is under way. Of course, *to the extent that* it is a means of transportation of cargo and crew, as discussed above, the STAR's engineers are involved in maintaining and repairing the vessel. So, when processing aboard the STAR has stopped and she is under way, the engineers' responsibilities to maintain the STAR as a seaworthy vessel continue. Maintaining the seaworthiness of the vessel continues to be their job while at anchor; it may, however, be less easy to visualize their maritime work in that situation.

While at anchor, the engineers are still responsible for the STAR's seaworthiness. If she takes on water, they would rig pumps to remove water from the hold; power from the generator is necessary to pump water out of the bilges. If a storm arrives, necessitating a move to a sheltered spot, the engineers weigh anchor, and are in-

volved in the move. If a fire breaks out, they would fight the fire. True, the power the engineers maintain operates the processing equipment and the refrigeration for the processed seafood cargo. However, even at anchor, the power also maintains deck lights (for crew safety), supplies fresh water and light for the living quarters, and power to the pumps. In summary, the engineers engage in the repair, operation, inspection, and maintenance of the vessel, whether under way or at anchor.

Emphasizing what it thought were industrial maintenance aspects of their work, the Court of Appeals found (to use the language of *Walling v. W. D. Haden*) that the engineers were "employed more in industry than in shipwork," and concluded they were therefore not exempt. The trial court found the primary emphasis of their duties (in the language of *Walling v. W. D. Haden*) to be "of a nautical kind, having to do with the management of the . . . barge as a vessel." These were factual interpretations, and while there may have been room for two opinions, where the evidence can be read either of two ways, the trial court's interpretation is not "clearly erroneous" and should not have been reversed.

III. Counsel's Drafting of Findings at the Court's Request Does Not Justify Closer Scrutiny of Them as Intimated by Respondents.

Too much is made in Respondents' Brief of the fact that Petitioner's counsel drafted the Findings and Conclusions in the case. The trial court had announced its decision and its reasoning orally, asking counsel to present Findings and Conclusions consistent with that oral opinion for her to review and, if acceptable, enter. In the form presented they were approved for entry by Respond-

ents' counsel. While the potential for overreaching and exaggeration on the part of attorneys preparing Findings has been recognized, *Anderson v. Bessemer City,* 470 U.S. —, 84 L. Ed. 2d 518, 527, 105 S. Ct. 1504 (1985), as in *Anderson,* there is no indication whatsoever that the District Court uncritically accepted Findings prepared by the prevailing party without judicial guidance. Moreover, even where adopted verbatim by the trial judge, the Findings are the court's and may be reversed only if clearly erroneous. *Anderson, supra,* 84 L. Ed. 2d at 527; *United States v. Marine Bancorporation,* 418 U.S. 602, 615 n. 13, 41 L. Ed. 2d 978, 94 S. Ct. 2856 (1974). As in *Anderson,* the framework for the proposed Findings was outlined by the trial court's oral opinion, which set forth in some detail the essential Findings and directed Petitioner's counsel to submit official Findings consistent with them. And as in *Anderson,* Respondents were provided the opportunity to respond to the proposed Findings; they were approved by Respondents' counsel for entry as prepared. Nothing in these circumstances justifies closer scrutiny of the trial court's Findings than the "clearly erroneous" standard of deferential review otherwise appropriate.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 85-195

IN THE

MOTION FILED

DEC 30 1985

Supreme Court of the United States

OCTOBER TERM, 1985

ICICLE SEAFOODS, INC.,
an Alaska corporation,

Petitioner,

versus

LARRY WORTHINGTON, individually,
ROGER CAMERON, individually,
DAVID DAVEY, individually, and
GERALD KENT, individually,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Motion of Maryland Casualty Company for Leave to File Amicus Curiae Brief and Brief in Support of the Position of Respondents

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No. 85-195

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ICICLE SEAFOODS, INC.,
an Alaska corporation,

Petitioner,

versus

LARRY WORTHINGTON, individually,
ROGER CAMERON, individually,
DAVID DAVEY, individually, and
GERALD KENT, individually,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Applicant, Maryland Casualty Company, respectfully moves this Honorable Court for leave to file an amicus curiae brief in support of the position of Respondents, Larry Worthington, Roger Cameron, David Davey and Gerald Kent. Respondents have given consent, but consent has not been given by Petitioner and leave to file must be sought.

The sole purpose of this amicus curiae brief is to direct this Court's attention to the distinction between the issue which this Court will decide herein regarding whether employees are "seamen" for the purpose of exemption from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 213(b) (6), and one of the central issues in maritime personal injury litigation, *i.e.*, whether an employee is a "seaman" as that term is used in the Jones Act, 46 U.S.C. § 688.

Although the term "seaman" is used by Congress in both the Fair Labor Standards Act and the Jones Act, the class of employees designated by that term is different under each Act, and the criteria for determining which employees fall within the class of seamen are entirely distinct for each Statute. Hence, it is imperative that this Court's decision in this case state explicitly that its application is restricted to the determination of those who are employed as "seamen" so as to be exempt from the overtime wage requirement of the Fair Labor Standards Act and that its holding is not pertinent to the determination of "seaman" status for purposes of deciding whether the employee is entitled to the negligence action against his employer which is granted by the Jones Act. Otherwise, the discussion of who is a "seaman" for purposes of the exemption from wage and hour provisions of the Fair Labor Standards Act may serve as a source of confusion for future Jones Act status determinations.

Maryland Casualty Company's interest in this issue arises out of its involvement in a Jones Act status proceeding entitled *Barrett v. Chevron, U.S.A., Inc.*, 752 F.2d 129 (5th Cir.1985), pending decision on rehearing en banc, in which the Fifth Circuit is reexamining the test for Jones Act seaman status enunciated by that court in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

In order that language used in deciding this case not become a source of confusion in the maritime realm of Jones Act seaman status, Maryland Casualty Company respectfully requests permission to appear herein as amicus curiae in order to elucidate a distinction believed to be necessary to precise determination by this Honorable Court.

DATED: December 30, 1985.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae is stated in the Motion for Leave to File Amicus Curiae Brief preceeding this brief. Maryland Casualty Company has no affiliation with any of the parties to this case.

SUMMARY OF ARGUMENT

The purpose of this brief is simply to suggest that the Court's decision herein specify that the issue being determined is limited to the interpretation of the term "seaman" as used in the statutory exemption from the overtime wage provisions of the Fair Labor Standards Act (FLSa) and is not relevant to determinations of an employee's status as "seaman" under the Jones Act, 46 U.S.C. § 688 (1982).

ARGUMENT

The issue for decision in this case concerns the manner of determining whether the maintenance workers employed aboard a seafood processing vessel are "seamen" for the purpose of a specific exemption from the general requirement of the FLSA which directs the payment of overtime compensation for all employees whose workweek is longer than 40 hours. 29 U.S.C. § 207(a)(1).

The maintenance employees involved in this case were primarily engaged in repair and maintenance work on the vessel, although they did occasionally operate anchor winches and tied and untied tender and fishing vessels alongside the barge. Under their contract, they were limited to monthly salaries with no provision for overtime compensation despite their commitment to work seven days a week for twelve or more hours each day.

Fair Labor Standards Act

The FLSA states its purpose as the correction and elimination of labor conditions, prevalent in 1938, which Congress found to be detrimental to the maintenance of the minimum standard of living necessary for the health and general well-being of workers. 29 U.S.C. § 202. As stated by the Fifth Circuit, the FLSA was enacted to eliminate the low wages and long working hours which plagued the American labor market. *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1188 (5th Cir. 1979).

Remedial labor statutes such as the FLSA are to be liberally construed and exemptions from their coverage must be read narrowly against the employer. *Menlo Service Corp. v. United States*, 765 F.2d 805, 809 (9th Cir. 1985).

Under the FLSA, § 213 (b)(6), "any employee employed as a seaman" is exempted from the premium overtime compensation benefits of 29 U.S.C. § 207.

The word "seaman" is not defined in the FLSA, but it has been uniformly interpreted in a manner consistent with the humanitarian purpose underlying this legislation.

Under the FSLA, the determination of whether an employee is "employed as a seaman" depends upon the work he actually performs and not his job title. The exemption has been strictly construed to limit its operation to those workers who perform services "primarily as an aid in the operation of a vessel as a means of transportation." *Donovan v. Nekton, Inc.*, 703 F.2d 1148, 1151 (9th Cir. 1983); *Bailey v. Pilots' Association for Bay & River Delaware*, 406 F. Supp. 1302, 1307 (D. Pa. 1976); *see also, Walling v. W. D. Haden Co.*, 153 F.2d 196, (5th Cir.) *cert. denied*, 328 U.S. 866 (1946); *Walling v. Sternberg Dredging Co.*, 64 F. Supp. 758, 761 (D. Mo.) *aff'd*, 158 F.2d 678 (8th Cir. 1946).

In reviewing the legislative history of the "seaman" exemption to the FLSA, the regulations promulgated by the Department of Labor state:

> **Adoption of the exemption in the original 1938 Act.**
>
> (a) The general pattern of the legislative history of the Act shows that Congress intended to exempt, as employees "employed as" seamen, only workers performing water transportation services. The original bill considered by the congressional committees contained no exemption for seamen or other transportation workers. At the joint hearings before the Senate and House Committees on Labor, representatives of the principal labor organizations representing seamen and other transportation workers testified orally and by writing that the peculiar needs of their industry and the fact that they were already under special governmental regulation made it unwise to bring them within the scope of the proposed legislation (see Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H.R. 7200, 75th Cong, 1st sess., pp. 545, 546, 547, 549, 1216, 1217). The committees evidently acquiesced in this view and amendments were accepted (81 Cong. Rec. 7875) and subsequently adopted in the law, exempting employees employed as seamen (sec. 13(a)(3)), certain employees of motor carriers (sec. 13(b)(1)), railroad employees (sec. 13(b)(2)), and employees of carriers by air (sec. 13(a)(4), now sec. 13(b)(3)).

* * *

(c) Consonant with this legislative history, the courts in interpreting the phrase "employee employed as a seaman" for the purpose of the Act have given it its commonly accepted meaning, namely, one who is aboard a vessel necessarily and primarily in aid of its navigation (Walling v. Bay State Dredging and Contracting Co., 149 F. 2d 346; Walling v. Haden, 153 F.2d 196; Sternberg Dredging Co. v. Walling, 158 F.2d 678). In arriving at this conclusion the courts recognized that the term "seaman" does not have a fixed and precise meaning but that its meaning is governed by the context in which it is used and the purpose of the statute in which it is found. In construing the Fair Labor Standards Act, as a remedial statute passed for the benefit of all workers engaged in commerce, unless exempted, the courts concluded that giving a liberal interpretation of the meaning of the term "seaman" as used in an exemptive provision of the Act would frustrate rather than accomplish the legislative purpose (Helena Glendale Ferry Co. v. Walling, 132 F. 2d 616; Walling v. Bay State Dredging and Contracting Co., supra; Sternberg Dredging Co. v. Walling, supra; Walling v. Haden, supra).

29 C.F.R. § 783.29 (1985).

Criteria for employment "as a seaman."

In accordance with the legislative history and authoritative decisions as discussed in §§ 783.28 and 783.29, an employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. This is true with respect to vessels navigation inland waters as well as ocean-going and coastal vessels (Sternberg Dredging Co. v. Walling, 158 F.2d 678; Walling v. Haden, 153 F.2d 196, certiorari denied 328 U.S. 866; Walling v. Great Lakes Dredge & Dock Co., 149 F.2d 9, certiorari denied 327 U.S. 722; Douglas v. Dixie Sand and Gravel Co., (E.D. Tenn.) 9 WH Cases 285). The Act's provisions with respect to seamen apply to a seaman only when he is "employed as" such (Walling v. Haden, supra); it appears also from the language of section 6(b)(2) and 13(a)(14) that they are not intended to apply to any employee who is not employed on a vessel.

29 C.F.R. § 783.31(1985).

Under the judicial interpretation and these regulations, the maintenance employees aboard the seafood processing vessel in this case are primarily industrial maintenance workers who should be covered by the FLSA overtime compensation provisions. They do not fall within the "seaman" exemption because their duties are not "primarily to aid in the operation of a vessel as a means of transportation." However in making this determination it is important to avoid confusion of the term "seaman" as used by Congress in other statutes.

The word "seaman" generally is statutorily defined in 46 U.S.C. § 713 as "every person . . . who shall be employed or engaged to serve in any capacity on board a vessel."

Jones Act

The term "seaman" is also found in the Jones Act, 46 U.S.C. § 688, which Congress passed in 1920 to grant "seamen" an action for damages occasioned by the negligence of the vessel's master or crew members.[1]

The Jones Act provides in pertinent part:

> (a) Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferrring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

1. An exhaustive treatment of the development of seaman status under the Jones Act is found in Engerrand & Bale, *Seaman Status Reconsidered*, 24 S. Tex. L.J., 431, 436-38 (1983), which constitutes the Appendix to this Brief.

Although the Jones Act provides a remedy for "any seaman" injured in the course of his employment, the term "seaman" as meant in 1920 when the Jones Act was passed, was the general term derived from the 19th Century and designated all workers who labored about vessels.

However, as part of its continuing effort [2] to distinguish "seamen" from land-based maritime workers such as longshoremen and harbor workers, in 1927 Congress passed the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901-950 (1982) expressly to restrict the class of "Jones Act seamen" to "members of a crew" of a vessel. *Id.* § 902(3)(G). Thus, seaman status under the Jones Act is determined by whether the worker is a "member of the crew of a vessel." This Honorable Court has repeatedly held that the effect of the Longshore Act is to confine the benefits of the Jones Act to members of the crew of a vessel. *Swanson v. Marra Bros.*, 328 U.S. 1, 7 (1946); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 257 (1940); *see also Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 374 (1957).

Thus, although Congress has statutorily defined the term "seaman" in 46 U.S.C. § 713 in general terms as any person employed or engaged on board a vessel, by enacting the Longshore Act, Congress has restricted those workers who may recover under the Jones Act to those "seamen" who are also members of a crew of a vessel as that term is meant in 33 U.S.C. § 902(3)(G).

2. *See* Engerrand & Rogers, *The Continuing Conflict Between Congress and the Supreme Court over the Standard of Care in Longshore Third Party Cases*, 22 S. Tex. L.J. 423 (1981).

In the three decades since this Court's last decision involving the determination of whether an employee is a "seaman" and member of a crew of a vessel for purposes of the Jones Act[3] divergent standards for determination of Jones Act seaman status have developed in the lower courts. *Compare Johnson v. John F. Beasley Construction Co.*,[4] 742 F.2d 1054, 1062 (7th Cir. 1984) *with Offshore Co. v. Robison*,[5] 266 F.2d 769, 779 (5th Cir. 1959) (the more generally accepted test for Jones Act seaman status). A thorough treatment of the confusion which already reigns in the maritime realm is set out in Engerrand & Bale, *Seaman Status Reconsidered*, 24 S. Tex. L.J. 431 (1983).

CONCLUSION

Because the term "seaman" is used without definition in both the FLSA and the Jones Act, it is respectfully suggested that unnecessary confusion be avoided by explicit statement that the decision in this labor law case concerns "seaman" as used in the FLSA only and is not a construction of the term "seaman" under the Jones Act. If this distinction is not set out clearly in this Court's decision, language in this case, construing the FLSA, may be cited in Jones Act litigation and serve to further confusion surrounding Jones Act seaman status in the courts below.

Respectfully submitted,

Eileen Madrid

Eileen Madrid

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3. *Butler v. Whiteman*, 356 U.S. 271 (1958).
4. The *Johnson* seaman status test limits "seamen" to those workers whose duties contribute to the maintenance, operation, or navigation of the vessel as a means of transport on water. 742 F.2d at 1061.
5. The *Robison* test confers Jones Act seaman status on workers who are permanently assigned to a vessel, or perform a substantial portion of their work aboard the vessel, and whose duties contribute to the function or mission of the vessel, or to its maintenance. 266 F.2d at 779.

APPENDIX

(5)

No. 85-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ICICLE SEAFOODS, INC.,
an Alaska corporation,

Petitioner,

versus

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Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Appendix to Brief of Maryland Casualty Company, as Amicus Curiae, in Support of Position of Respondents

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Seaman Status Reconsidered

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SEAMAN STATUS RECONSIDERED

KENNETH G. ENGERRAND* AND JEFFREY R. BALE**

I. INTRODUCTION

"It is impossible to define the phrase, 'member of a crew' in general terms; the words are colloquial and their fringe will always be somewhat ragged. Perhaps the best hope is that, as the successive variants appear, they will finally serve rudely to fix the borders."[1] The courts have struggled with the meaning of the terms "seaman" and "member of a crew," and Congress has also played a role in their development. Because "words are flexible,"[2] however, "verbal niceties" have been bent "to give protection to workers injured upon ships."[3] It has even been suggested that "three men in a tub would fit within our definition, and one probably could make a convincing case for Jonah inside the whale."[4]

This article will trace the development and expansion of the concept of seaman status and explore the relationship between the legislation on

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1. Hawn v. American S.S. Co., 107 F.2d 999, 1000 (2d Cir. 1939).
2. International Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1926).
3. Warner v. Goltra, 293 U.S. 155, 156 (1934). The reasoning underlying the solicitude for seamen was stated in the JAMES H. SHRIGLEY, 50 F. 287, 287-88 (N.D.N.Y. 1892):

> They are regarded as the wards of the court and every shield and safeguard which the law can give is thrown around them, both by legislative enactment and judicial decision. Their usefulness and importance on the one hand and their proverbial improvidence and recklessness on the other have made them the objects of solicitude in all commercial nations. They are recognized as a thoughtless, imprudent, rash and impulsive class, ignorant of their rights and easily imposed upon by sharp and designing men. Admiralty courts which do not follow the harsh and unyielding rules of the common law, but sit rather as courts of equity, are vigilant to protect them and hold as void and as of no effect all contracts and stipulations made by them which are in derogation or relinquishment of any of their general rights and privileges. It is the aim of the law to shield them from oppression and take care of their rights and interests by protecting them, not only against the master, but also against themselves.

See also Harden v. Gordon, 11 F. Cas. 480, 483 (C.C.D. Me. 1823)(No. 6,047).

4. Burks v. American River Transp. Co., 679 F.2d 69, 75 (5th Cir. 1982).

the issue and the judicial interpretation of it.

II. PRE-STATUTORY DEVELOPMENT

Although the seaman status cases are currently in a state of disarray, the situation has not degenerated significantly from the past century. The Nineteenth Century brought a plethora of elements for determining seaman status, and several of these elements have survived as part of the current formula. The oldest tests had their basis in the navigation of the ship.[5] This was frequently captured in the requirements that a worker hand, reef and steer: "[T]he persons engaged on board of her must have been possessed of some skill in navigation. They must have been able to 'hand, reef and steer,' the ordinary test of seamanship."[6] As the days of sailing vessels passed and the era of steamers took hold,[7] the test was altered: "When the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangements under which they are on board."[8]

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5. See, *e.g.*, Black v. The LOUISIANA, 3 F. Cas. 503 (D. Pa. 1804)(No. 1,461) in which the court stated: "Although the cook and steward are authorized to sue in the admiralty court, as mariners and part of the crew, yet I have distinguished their cases, as their duties are distinct from those mariners employed in navigating the ship." *Id.* at 503. Most of the cases focused on the duties performed by the worker, but the courts also required that there be a vessel engaged in navigation. *See, e.g.*, The SIRIUS, 65 F. 226, 235 (N.D. Cal. 1895).

6. The CANTON, 5 F. Cas. 29, 30 (D. Mass. 1858)(No. 2,388); *see also* The BUENA VENTURA, 243 F. 797, 799 (S.D.N.Y. 1916).

7. H. FARNAM, THE SEAMEN'S ACT OF 1915, S. Doc. No. 333, 64th Cong., 1st Sess. 13 (1916) [hereinafter cited as FARNAM]:

> A great change has taken place in the last half century in the functions of seamen on steamboats. Long after steam had become the main motive power, ocean-going ships were equipped with masts and sails, which were frequently used to supplement the steam. The deck hand was a sailor as well as a seaman. He had to understand how to handle the rigging of a ship and know the technique of his calling. Now, as has been frequently pointed out, the steamships make practically no use of sails and the seaman is mainly occupied in cleaning the decks, polishing the brasses, and acting as lookout. Comparatively few men are needed for this purpose, and it is not especially important that they should either be able to understand the officers or that they should have had experience in their calling in normal times.

8. The BOUND BROOK, 146 F. 160, 164 (D. Mass. 1906); see also The W.F. BROWN, 46 F. 290 (E.D. La. 1891) in which performers in a circus brought an action for wages against a vessel being used in connection with the performance of the circus. A floating circus house was towed between Evansville, Indiana and New Orleans, Louisiana by a steamer which was previously operating as a ferry boat. After determining that the craft which towed the floating circus house was a vessel "engaged in commerce and navigation," *id.* at 291, the court addressed the question whether the claimants were "sailors, —mariners, —in that they were employed to navigate the vessel." *Id.* Although they performed some duties connected with running the vessel, their "chief substantive business or service was to perform before an audience." *Id.* Considering it as "land employment," the court denied seaman status to the performers. *Id.; see also* Gurney v. Crockett, 11 F. Cas. 123, 124

The "aid in navigation" test was subtly modified almost from its inception. An example is *Trainer v. The SUPERIOR*[9] in which musicians on a canal museum boat made a claim for seamen's wages. The musicians claimed that their services as entertainers were required only at stopping places, and that during the movement of the vessel they assisted in rowing and in attending the sails.[10] The court stated: "The broadest principle, however, that has yet been recognized is, that the services rendered must be necessary, or, at least, contribute to the preservation of the vessel, or of those whose labour and skill are employed to navigate her."[11] The court looked to the written contract for the claimants' services which provided for "their performances as musicians on board the canal museum boat."[12] Since the contract had "nothing to do with the navigation or preservation of the boat or her crew," the court dismissed the claim for seamen's wages.[13]

In order to satisfy the aid in navigation test, workers on vessels emphasized their incidental duties which were related to the navigation of the vessel. When this reached the point of fantasy,[14] a new test was developed which brought additional persons under the protection of seaman status without as much creative job characterization as was necessary under the aid in navigation test. In *The OCEAN SPRAY*,[15] the claim was made by sealers and interpreters[16] on a fishing vessel. They attempted to satisfy the navigation test with evidence that, although they did not stand watch, they did procure driftwood and water for the vessel, heave the anchor and clear decks, and help make and reef sail.[17] The court noted that persons such as surgeons, carpenters, cooks and cabin boys had been considered seamen, but it was "claimed that this is so for the reason that these persons all aid in the navigation and preservation of the vessel."[18]

(S.D.N.Y. 1849)(No. 5,874).

9. 24 F. Cas. 130 (E.D. Pa. 1834)(No. 14,136). For a more recent musician's claim to seaman status, see Szumlicz v. Norwegian Am. Line, 698 F.2d 1192 (11th Cir. 1983).

10. *Trainer*, 24 F. Cas. at 131.

11. *Id.*

12. *Id.*

13. *Id.*; see also Sageman v. The BRANDYWINE, 21 F. Cas. 149 (D. Mich. 1852)(No. 12,216) in which the court stated: "To entitle one to sue as a mariner, the services rendered must pertain to the business of navigation, and be such as are necessary, or tend to preserve the vessel, or take care of those navigating the vessel." *Id.* at 149.

14. In connection with the musicians' claim in *Trainer* that they helped in rowing and attending the sails, the court pointed out: "It was admitted that the musicians worked sometimes, but it was as they pleased, and no right was claimed of them for such services. When tired they stopped at their own pleasure, and went below to read. They frequently refused to work when requested." *Trainer*, 24 F. Cas. at 131.

15. 18 F. Cas. 558 (D. Ore. 1876)(No. 10,412).

16. The vessel took on 24 Indians to catch and club seals and 2 interpreters to communicate with them. Besides the master, the crew of the vessel was comprised of a first and second mate, four men before the mast and a cook. *Id.* at 558.

17. *Id.* at 560.

18. *Id.*

The court rejected this analysis and held that the workers in *The OCEAN SPRAY* were seamen because they were "co-laborers in the leading purpose of the voyage."[19] The purpose of the voyage—catching seal—could not have been accomplished without the sealers, and the profit of the voyage depended upon them as much as upon the cook or sailors.[20]

It took "a stretch of the imagination" to categorize the employees performing tasks unrelated to navigation in the same class with "the bold and skillful mariners who breast the angry waves of the Atlantic;" and the expansion was a manifestation of the ability of the admiralty courts to adapt to "new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world."[21] In his original treatise, Benedict foresaw the change:

> In the whale ship, the sealing vessel—the codfishing and herring fishing vessel—the lumber vessel—the freighting vessel—the passenger vessel—there are other functions besides these of mere navigation, and they are performed by men who know nothing of seamanship—and in the great invention of modern times, the steamboat, an entirely new set of operatives, are employed, yet at all times and in all countries, all the persons who have been necessarily or properly employed in a vessel as co-labourers to the great purpose of the voyage, have, by the law, been clothed with the legal rights of mariners—no matter what might be their sex, character, station or profession.[22]

The concept that all co-laborers on the vessel should have the status of seamen had its origin in Justice Story's opinion in *United States v. Winn*,[23] in which he equated the word crew with the "ship's company."[24] This opened the door to permit such workers as bartenders,[25] horsemen and muleteers,[26] coopers,[27] pursers,[28] cooks and stewards[29] and a host of

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19. *Id.*
20. *Id.*; *see also* Saylor v. Taylor, 77 F. 476, 479 (4th Cir. 1896) ("contributes in any degree, however slight to the accomplishment of the main object in which the vessel is engaged"); The BUENA VENTURA, 243 F. at 799 ("contribute to and labor about the operation and welfare of the ship when she is upon a voyage"); The J.S. WARDEN, 175 F. 314, 315 (S.D.N.Y. 1910) ("further the purposes of her voyage"); The MINNA, 11 F. 759, 760 (E.D. Mich. 1882) ("furtherance of the main object of the enterprise in which she is engaged").
21. *Saylor*, 77 F. at 479.
22. E. BENEDICT, THE AMERICAN ADMIRALTY § 241, at 134 (1st ed. 1850) (footnote omitted).
23. 28 F. Cas. 733 (D. Mass. 1838)(No. 16,740).
24. *Id.* at 734. *See also* United States v. Atlantic Transp. Co., 188 F. 42, 43 (2d Cir.), *cert. denied*, 223 U.S. 724 (1911).
25. The J.S. WARDEN, 175 F. at 314, 315.
26. *Atlantic Transp. Co.*, 188 F. at 43; The BARON NAPIER, 249 F. 126, 132 (4th Cir. 1918).
27. United States v. Thompson, 28 F. Cas. 102, 102 (D. Mass. 1832)(No. 16,492).
28. The WANDERER, 20 F. 655, 656 (C.C.D. La. 1880).

others[30] to attain seaman status.

The fact that more workers were awarded seaman status did not mean that there was uniformity in determining who was a seaman.[31] In *The OLE OLESON*,[32] the claimants were employed as stone-pickers to gather stone on the shore of Lake Michigan and to assist in loading the stone on a vessel for transport to Chicago. The workers did not accompany the vessel on her voyages. The court initially noted the "ordinary test of seamanship," that the workers be able to "hand-reef and steer."[33] The court then analyzed the requirements that the workers aid in the "navigation and preservation of the vessel" and that they be "employed in promoting the purpose of the voyage."[34] The judge finally cited the "furtherance of the main object of the enterprise" analysis,[35] and noted that in a general sense the stone-pickers were in furtherance of the vessel's employment.[36] The crucial fact, however, was that the claimants were laborers on shore or landsmen.[37] Their services were completed before the voyage ever began. Consequently, they had no lien for seamen's wages.[38]

Despite the inclination of most courts to expand the class of workers given seamen status, there had been no definitive ruling on the issue as the Twentieth Century beckoned. To make matters worse, it was time for the entrance of Congress into the fray. As with other congressional intrusions,[39] the confusion was just beginning.

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29. Allen v. Hallett, 1 F. Cas. 472, 473 (S.D.N.Y. 1849)(No. 223); Smith v. The PEKIN, 22 F. Cas. 620 (E.D. Pa. 1831)(No. 13,090); Turner's Case, 24 F. Cas. 340 (D. Me. 1825)(No. 14,248); Black v. The LOUISIANA, 3 F. Cas. 503. For female cooks see The JAMES H. SHRIGLEY, 50 F. 287, 288 (N.D.N.Y. 1892); Wolverton v. Lacey, 30 F. Cas. 417, 418 (N.D. Ohio 1856)(No. 17,932); Sageman v. The BRANDYWINE, 21 F. Cas. 149.

30. *See, e.g.*, The CARRIER DOVE, 97 F. 111, 112 (1st Cir. 1899) (fisherman); Saylor v. Taylor, 77 F. at 479 (employees on a dredge); The MARY ELIZABETH, 24 F. 397 (C.C.S.D. Ala. 1885) (pilots); The BUENA VENTURA, 342 F. at 799-800 (wireless operator); The VIRGINIA BELLE, 204 F. 692, 693-94 (E.D. Va. 1913) (engineer who assisted in fishing); The Murphy Tugs, 28 F. 429, 430-31 (E.D. Mich. 1886) (diver and steam-pump engineer); The NORTH AMERICA, 18 F. Cas. 339, 340 (E.D.N.Y. 1872)(No. 10,314) (fireman); The SULTANA, 23 F. Cas. 379 (D. Mich. 1857)(No. 13,604) (clerk); Wilson v. The OHIO. 30 F. Cas. 149, 150 (E.D. Pa. 1834)(No. 17,825) (pilot, fireman and deckhands).

31. Cases involving longshoremen illustrate the disparate results. *Compare* Paul v. The ILEX, 18 F. Cas. 1346 (C.C.D. La. 1876)(No. 10,843); Cox v. Murray, 6 F. Cas. 681 (S.D.N.Y. 1848)(No. 3,304) *with* The DAISY, 282 F. 261 (9th Cir. 1922); The CANTON, 5 F. Cas. 29. *See also* The GEORGE T. KEMP, 10 F. Cas. 227 (D. Mass. 1876)(No. 5,341).

32. 20 F. 384 (E.D. Wis. 1884).

33. *Id.* at 384 (quoting The CANTON, 5 F. Cas. at 30).

34. *Id.* at 385.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 385-86.

39. See, *e.g.*, Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980)(en banc), *cert. denied*, 452 U.S. 905 (1981), in which the Fifth Circuit was divided 15 to 8 on the extent of shoreside coverage of the Longshoremen's and Harbor Workers' Compensation

III. THE STATUTORY SCHEME

From 1915 to 1927, Congress passed five statutes in an effort to provide acceptable remedies for maritime workers. Each act was a response to a decision from the Supreme Court.

In 1903, the Supreme Court handed down its opinion in *The OSCEOLA*.[40] Patrick Shea, a seaman on the OSCEOLA, was injured while attempting to hoist the gangway in preparation for docking. The vessel was proceeding at 11 miles per hour against a head wind of 8 miles per hour, and the force of the wind on the gangway pulled the hoisting derrick over onto Shea. The questions presented to the Supreme Court by the court of appeals involved the liability of the vessel for the negligent order of the master to hoist the gangway under the prevailing conditions.[41] After a thorough review of English and American precedents,[42] the Court considered four propositions to be settled law:

> 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
>
> 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.
>
> 3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.
>
> 4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.[43]

Thus, the Court answered the questions posed by the lower court by

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Act, 33 U.S.C. §§ 901-50 (1976).

40. 189 U.S. 158 (1903).

41. *Id.* at 160. The court of appeals posed three questions:

> First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.
>
> Second. Whether in the navigation and management of a vessel the master of the vessel and the crew are fellow servants.
>
> Third. Whether, as a matter of law, the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent.

42. *Id.* at 169-75.

43. *Id.* at 175 (citation omitted).

holding that the vessel was not responsible for the negligent order of the master.[44]

After the loss of the TITANIC in April, 1912, the safety of ocean travel was the subject of serious debate both internationally and in Congress.[45] The necessity of better training of seamen[46] and more stringent regulations for life-saving equipment,[47] together with the desire of abolishing arrest and imprisonment as a penalty for desertion,[48] led to the passage in 1915 of An Act to Promote the Welfare of American Seamen in the Merchant Marine of the United States.[49] The final provision of the Act, section 20, was the subject of no debate and was always treated as an afterthought.[50] Section 20 provided: "That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."[51]

The drafters of section 20 apparently intended to overturn the result in *The OSCEOLA*, but the Supreme Court quickly ruled that this provision was inadequate. In *Chelentis v. Luckenbach S.S. Co.*,[52] a fireman on the J.L. LUCKENBACH suffered a broken leg when he was knocked down by a wave. He claimed his injuries resulted from the negligent order of a superior officer, but the trial court directed a verdict against him.[53] Congress had dealt with the third point in *The OSCEOLA* which gave the employer the fellow-servant defense.[54] Congress had failed to realize, however, that the fourth point in *The OSCEOLA* independently provided for no negligence remedy for seamen. The Supreme Court in *Chelentis* was willing to give "full effect" to the Statute, but since it only cured half of the problem, "it was of no consequence . . . to petitioner whether or not the alleged negligent order came from a fellow servant; the statute is irrelevant."[55]

As Congress had done in 1915, it chose to overturn the Supreme Court's decision by adding a section to a major piece of shipping legisla-

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44. The court answered the first and third questions in the negative. *Id.* at 177.
45. FARNAM, *supra* note 7, at 8; S. Doc. No. 8, 63d Cong., 1st Sess. 1 (1913).
46. FARNAM, *supra* note 7, at 4.
47. *Id.* at 9, 10-11.
48. 52 CONG. REC. 4643, 4646, 4650, 4651 (1915).
49. Pub. L. No. 63-302, 38 Stat. 1164 (1915). The full title is An Act to Promote the Welfare of American Seamen in the Merchant Marine of the United States; to Abolish Arrest and Imprisonment as a Penalty for Desertion and to Secure the Abrogation of Treaty Provisions in Relation Thereto; and to Promote Safety at Sea.
50. *See, e.g.*, H.R. REP. No. 1439, 63d Cong., 3d Sess. 25, 30 (1915); 52 CONG. REC. 4639, 4640 (1915).
51. 38 Stat. 1164, 1185.
52. 247 U.S. 372 (1918).
53. *Id.* at 379.
54. *See supra* text accompanying note 43.
55. *Chelentis*, 247 U.S. at 384.

tion. The Merchant Marine Act of 1920[56] contained the Ship Mortgage Act,[57] amended the Maritime Lien Act of 1910[58] and established the United States Shipping Board.[59] Section 33 of the Act received little attention and was enacted on the coattails of the major provisions in the bill.[60] In essence, it overruled *Chelentis* and the fourth point in *The OSCEOLA* by granting "any seaman" the negligence action denied him by the Supreme Court.[61]

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56. Act of June 5, 1920, ch. 250, 41 Stat. 988. The Act, and particularly section 33, have come to be known as the Jones Act. Senator Wesley L. Jones of Washington was Chairman of the Senate Committee on Commerce.

57. *Id.* § 30, 41 Stat. 988, 1000-05 (codified at 46 U.S.C. §§ 911-61 (1976)).

58. Act of June 5, 1920, ch. 250, § 30, 41 Stat. 988, 1005-06 (codified as amended at 46 U.S.C. §§ 971-75 (1976)).

59. Act of June 5, 1920, ch. 250, § 3, 41 Stat. 988, 989-90.

60. The major purpose of the Statute was stated by the Senate Committee on Commerce, S. REP. No. 573, 66th Cong., 2d Sess. 3 (1920):

> From our viewpoint, however, the most important question, and the most difficult one, is to take care of the future of our merchant marine and make it what it ought to be. Not only must this be kept in view in the disposal of our ships, but we must make provision so that they can be operated and maintained in competition with the world. We deem it wise to embody provisions dealing with both of these problems in one bill.
>
> We assert the need of a merchant marine for the national defense and for our commercial growth and declare it our policy to do whatever may be necessary to meet this need.

The major areas of controversy in the Merchant Marine Act of 1920 arose over the nature, power and discretion of the United States Shipping Board; the nature and extent to which the United States merchant marine should be subsidized, including the carrying of mail in United States vessels; the extension of coastwise trade laws to island territories and possessions of the United States, particularly the Philippine Islands; conversion of the United States government fleet of vessels from World War I to private ownership; government recognition of the American Bureau of Shipping; priority of the preferred ship mortgage over liens for necessaries and repairs; nullification of treaties restricting the right of the United States to impose discriminating customs duties; authority of Panama Railroad Co. vessels to engage in Central and South American trade and subsidizing new construction of vessels by the granting of tax exemptions. 59 CONG. REC. 6803, 6805, 6806-16, 6857-69, 6984-95, 7211, 7223-27, 7274-75, 7293-97, 7336-46, 7347-56, 7409-20 (1920); *see also id.* at 8163-71, 8338-44, 8398-412, 8442-53, 8465-70, 8493-502, 8572-77, 8588-609.

The provision in the Merchant Marine Act of 1920 dealing with seamen's remedies was originally introduced by Senator Jones on February 6, 1920 as the final section of S. Res. 3876, 66th Cong., 2d Sess. § 3 (1920), and was added by the Senate Committee on Commerce to H.R. Res. 10,378, 66th Cong., 1st Sess. (1919). S. REP. No. 573, 66th Cong., 2d Sess. 23. It was subsequently passed as section 33 of H.R. Res. 10,378 with the addition of a second sentence: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 59 CONG. REC. 8170, 8344, 8404, 8409, 8448, 8452, 8499, 8594, 8598 (1920).

61. Act of June 5, 1920, ch. 250, § 33, 41 Stat. 988, 1007. The original section is codified at 46 U.S.C. § 688 (1976). The Jones Act was recently amended by changing the former section 688 into subsection (a) and by adding a subsection (b) to remove certain aliens from the coverage of the Act. Act of December 29, 1982, Title V, § 503(a), 96 Stat. 1955 (codified as amended at 46 U.S.C.A. § 688 (West Supp. 1982-83). The Jones Act provides:

> (a) Any seaman who shall suffer personal injury in the course of his employment

In contrast to the paucity of express legislative intent in dealing with seamen's remedies, Congress stated its intentions clearly in dealing with the rights of land-based maritime workers. The struggle between the Supreme Court and Congress over land-based maritime workers had its origin in *Atlantic Transport Co. v. Imbrovek*.[62] Imbrovek was a longshoreman employed by Atlantic Transport Co. to load copper on the PRETORIA, owned by Hamburg-American Steam Packet Co. Imbrovek was struck by a hatch cover which fell into the hold of the vessel, and he brought suit against the vessel owner and his employer, the stevedore.[63] The action was dismissed against the vessel owner, but a judgment was rendered in Imbrovek's favor against the stevedore.[64] Before the Supreme Court, the issue was whether the district court had admiralty jurisdiction

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may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b)(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by (a)[sic] vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

Id. (footnote omitted).

62. 234 U.S. 52 (1914).
63. *Id.* at 57.
64. *Id.*

over the claim against the stevedore.[64] In upholding the admiralty jurisdiction over the claim, the Court laid the foundation for future conflict: "Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' "[65]

The decision which precipitated legislation for land-based maritime workers is *Southern Pacific Co. v. Jensen*.[67] Jensen was employed by Southern Pacific Co. to assist in unloading the defendant's vessel EL ORIENTE. Jensen was driving a small electric freight truck out of the side of the vessel and onto the gangway when it jammed on the gangway. In trying to free the truck, he forgot to duck and suffered a broken neck which caused his death. Jensen's widow and children made a claim under the New York workmen's compensation statute,[68] and an award was granted by the New York Workmen's Compensation Commission.[69] After the Supreme Court's decision in *Imbrovek*, the suit fell within the admiralty jurisdiction.[70] The question then involved the power of the state to provide the remedy in a maritime action.

The Supreme Court began its analysis with the constitutional grant of "judicial power" to the United States over "all cases of admiralty and maritime jurisdiction,"[71] which is supplemented by Congress' power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . ."[72] The Court interpreted these provisions to mean that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."[73] The Court then stated that "the general maritime law, as accepted by the Federal Courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."[74] After elevating the general maritime law to the same constitutional status as congressional legislation,[75] the Court concluded its analysis by prohibiting interference from state statutes:

> And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material

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65. *Id.* at 58.
66. *Id.* at 62 (quoting The CIRCASSIAN, 5 F. Cas. 702, 702 (E.D.N.Y. 1867)(No. 2,722)); *see also* The GEORGE T. KEMP, 10 F. Cas. 227, 229-30 (D. Mass. 1876)(No. 5,341).
67. 244 U.S. 205 (1917).
68. N.Y. WORK. COMP. LAW (McKinney 1965).
69. *Jensen*, 244 U.S. at 208-09.
70. *Id.* at 217.
71. U.S. CONST. art. III, § 2.
72. *Id.* art. I, § 8.
73. *Jensen*, 244 U.S. at 215.
74. *Id.*
75. It was in response to this concept that Justice Holmes stated: "The common law is not a brooding omnipresence in the sky . . . ." *Id.* at 222 (Holmes, J., dissenting).

> prejudice to the characteristic features of the general maritime law; or interferes with the proper harmony and uniformity of that law in its international and interstate relations.[76]

In the case of the New York workmen's compensation act, the Court stated that the consequence of each state applying different statutes "would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish."[77] Thus, to apply the New York statute to Jensen's death was unconstitutional.[78]

It took Congress less than five months to respond to the *Jensen* decision. The drafters of the legislation ignored the primary basis for the decision and instead focused[79] on the gratuitous language at the end of the opinion which provided that workmen's compensation was not saved to suitors from the exclusive grant of admiralty and maritime jurisdiction to the federal courts.[80] Therefore, the vehicle chosen to overturn *Jensen* was a simple addition to the "saving to suitors" clause so that it would also preserve "to claimants the rights and remedies under the workmen's compensation law of any State . . . ."[81]

In *Knickerbocker Ice Co. v. Stewart*,[82] another attempt was made to invoke the New York workmen's compensation statute in the context of a maritime death.[83] The Supreme Court interpreted the Constitution as granting to Congress power to legislate in maritime matters on the follow-

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76. *Id.* at 216.
77. *Id.* at 217.
78. *Id.* at 217-18. After holding the application of the New York Statute in the maritime context unconstitutional, the Supreme Court pointed out that the federal courts have exclusive jurisdiction of admiralty cases, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." Judiciary Act of 1789, ch. 20, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1333(1) (1976)). The Court concluded that the remedy provided in workmen's compensation statutes "is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction." *Jensen*, 244 U.S. at 218.
79. 55 CONG. REC. 7605, 7843 (1917). There was practically no debate on the Statute because the legislators were convinced that land-based workers should be subject to state compensation:

> Now all that we do is to put longshoremen and stevedores on a parity or equality with other laborers. I do not think anybody can object to it. I think it is absolutely fair and is very important to the labor of the country in view of the unrest that exists among a great many longshoremen and stevedores on account of the present discrimination against them in the application of State compensation laws.

Id. at 7843 (statement of Rep. Webb). "I think no one can even suggest any reason why a stevedore or a longshoreman who suffers an accident may not properly have the benefit of the workmen's compensation law of the State in which he lives and is working." *Id.* at 7605 (statement of Sen. Cummins).
80. *See supra* note 78.
81. Act of Oct. 6, 1917, ch. 97, 40 Stat. 395.
82. 253 U.S. 149 (1920).
83. William E. Stewart was a bargeman employed by Knickerbocker Ice Co. He fell into the Hudson River and drowned, and his widow made a claim for compensation under the New York Statute. *Id.* at 155.

ing basis: "The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."[84] The Court struck down the Statute because any legislation by Congress would have to embody its "will and deliberate judgment," and the subject was "not for delegation to others."[85] The Court did, however, indicate a possible solution: "To say that, *because Congress could have enacted a compensation act applicable to maritime injuries*, it could authorize the states to do so, as they might desire, is false reasoning."[86]

The 1917 legislation attempted to give "claimants" the benefit of state compensation and was not limited in scope to land-based workers. In fact, Congress subsequently admitted that the Statute "was intended to permit the extension of the benefits of the State workmen's compensation laws to seamen and other workers on or in connection with ships . . . ."[87] In 1920, Congress removed part of the constitutional problem by enacting the Jones Act covering seamen. In 1922, Congress sought to provide a remedy for land-based workers by once again amending the saving to suitors clause to preserve "to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory or possession of the United States, which rights and remedies when conferred by law shall be exclusive . . . ."[88] Congress believed that by excluding seamen (master or members of the crew of a vessel) the constitutional requirement of uniformity of the maritime law would be fulfilled.[89] Additionally, however, Congress expressed

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84. *Id.* at 164.
85. *Id.*
86. *Id.* (emphasis added).
87. S. REP. No. 94, 67th Cong., 1st Sess. 1 (1921); *see also* H.R. REP. No. 639, 67th Cong., 2d Sess. 9 (1922); 62 CONG. REC. 7754 (1922).
88. Act of June 10, 1922, ch. 216, 42 Stat. 634.
89. H.R. REP. No. 639, *supra* note 87, at 5-9; S. REP. No. 94, *supra* note 87, at 6-8. The drafters of the 1922 Act were encouraged by two recent decisions from the Supreme Court which indicated that state statutes could have application in the maritime context, Grant Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922) and Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). Congressman Briggs stated:

> In view of the recent decision of the Supreme Court of the United States in the case of the Western Fuel Co. against Garcia, decided on December 5, 1921, which limits the previous decisions of the same court in the Jensen and Knickerbocker Ice Co. cases, and in view of the restricted character of the bill I believe that the objections heretofore raised have been overcome, and that the power of the State to include those engaged in longshore work within the terms of the workmen's compensation acts can be recognized as valid and not in conflict with the maritime law and admiralty jurisdiction of the United States, and does not destroy the uniformity of such maritime law.

62 CONG. REC. 7755 (1922) (statement of Rep. Briggs). Other decisions involving state stat-

its intent that seamen be treated differently from land-based workers. The legislators pointed out that "Congress has always in legislating distinguished between these port workers and seamen."[90] It was admitted that this distinction had been "confused" in the 1917 legislation[91] and that Congress had always intended for seamen to fall within the protection of federal statutes and for longshoremen to be covered under state statutes.[92] As opposed to "seamen who are peripatetic individuals," the

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utes and maritime workers during the period of statutory formulation are Millers' Indem. Underwriters v. Braud, 270 U.S. 59 (1926); State Indus. Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922).

90. H.R. REP. No. 639, *supra* note 87, at 4.

91. S. REP. No. 94, *supra* note 87, at 2.

92. *Id.* at 2-3.

> There is a clear distinction between the two classes, seamen and landsmen, who work in or about ships, who were confused in the Johnson amendment and in the situation which arose in the Jensen case. The distinctions are based upon the facts of their employment, upon the separate systems of law which have hitherto been applied them, and the character of employers which, in case of seamen, are ships or shipowners, and in the case of landsmen in the main, independent local contractors. The seamen in their normal life are migratory. They pass from port to port, from State to State, from country to country. To permit in their case the application of the varying laws of the several States in respect to injuries suffered in the course of their employment would be unfair both to the ship and to the seamen. . . . Seamen are subject to a special law of the sea which in the United States is nation wide. Congress legislates in respect to the conditions of employment of seamen and their relations with their employers. The rights of a seaman when injured in the course of his employment are governed not by the common law of torts, but by a special set of rules which are based upon the difference in the conditions of his employment and those of ordinary land workers. A seaman is entitled to maintenance, care, and cure at the expense of the ship and to his wages to the end of the voyage without regard to the question of negligence. When he reaches port the United States Marine Hospital is open to him without expense on his part until he is cured of his illness or injury. This form of compensation for accidents or illnesses incurred by a seaman is of great antiquity; it marks him off very clearly from the landsman who works on ships in port. The rules which govern his right to recover damages for an injury happening at sea because of negligence or fault are different from those which govern the right of recovery of any other class of workmen. The special treatment which seamen have always had under the acts of Congress was recently emphasized by the provision in the merchant marine act of 1920 extending to seamen but not to other maritime workers the same rights of recovery in case of work accidents now enjoyed by interstate railway employees.
>
> The employer in the case of a seaman is always the owner or charterer of a ship and he has the use of the peculiar remedies of the admiralty against the ship to recover his wages, or his damages under the maritime law in case of injury.
>
> Longshoremen and ship-repair men are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor force of each State exactly as other workmen in the port in which they are employed. They are not migratory but local; their wages, their conditions of living are governed by local standards. They do not in all cases form a special class always employed in this work.

Id. (citation omitted).

land-based workers such as longshoremen "are part of the local labor force and are permanently subject to the same conditions as are other local workmen."[93] "The peculiar maritime law, applying to seamen is inapplicable to their condition and no attempt has been made to apply it to them."[94]

The 1922 Statute was considered by the Supreme Court in *Washington v. W.C. Dawson & Co.*[95] After reviewing its decisions in *Southern Pacific Co. v. Jensen* and *Knickerbocker Ice Co. v. Stewart*, the Court concluded that "the provisions of the Act of 1922 cannot be reconciled therewith."[96] Having twice struck down Congress' attempted delegation to the states, the Court strongly hinted that the solution was a federal compensation statute:

> Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general

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Congress has always in legislating distinguished between these port workers and seamen. It has assumed full control over the relation of master and servant at sea. Federal legislation determines the character of the quarters in which the crew is to be housed, the food to be served to them, hours of labor, reciprocal duties of seaman and officer. A Federal statute changed the age-long maritime rule which subjected a sailor leaving his ship to arrest, and made his return on board imperative. The rights of a seaman against the shipowner in case of injury or sickness are not at all similar to those which govern the right of recovery in the same case in land employment. The owner must care for the sick or injured sailor; he must pay his wages until the home port is reached and then the United States Marine Hospital Service takes him into its protection till he is recovered to health. He is thus already to a degree protected by a form of workmen's compensation, since this duty of the ship and the care in the marine hospitals does not depend upon any fault imputable to the owner. His right to recover damages was strictly limited by the law of the sea, but Congress in the merchant shipping act of 1920 gave him a wide right to recover damages by putting him on a basis with the employees in interstate commerce.

H.R. REP. No. 639, *supra* note 87, at 4.

It seems to me, as to the people who live in the community and are a part and parcel of the citizenship of that community, that they ought not to be subject to a different rule from any other citizen of that community. I can see very readily that a different rule ought to apply to the sailors that may not belong to that community at all. If a nonresident sailor comes inside of a harbor and is injured while there, there is reason why he should not come under the compensation laws of the State and be entitled to compensation. But as to the men that this bill cover [sic], it seems to me clearly that the State ought to be responsible and that the State ought to pay their damages. There can be no good reason for a distinction between these people and the ordinary citizens of the State. The work of the longshoremen has very little to do with shipping as such. They load and unload vessels, repair ships, and do other work of that kind largely on the shore.

62 CONG. REC. 7754 (1922) (statement of Rep. Volstead).

93. H.R. REP. No. 639, *supra* note 87, at 2.
94. S. REP. No. 94, *supra* note 87, at 3.
95. 264 U.S. 219 (1924).
96. *Id.* at 227.

> employers' liability law, or general provisions for compensating injured employees; but it may not be delegated to the several states. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress.[97]

After sending Congress back to the drawing board, the Supreme Court added the incentive which spurred Congress to accept the Court's suggestion. In *International Stevedoring Co. v. Haverty*,[98] a longshoreman was injured by the negligence of a fellow servant and sued his employer, a stevedoring company. After noting that "for most purposes . . . stevedores are not 'seamen,' "[99] the Court drew upon its analysis of the nature of the work performed by the ship's crew from *Atlantic Transport Co. v. Imbrovek*:[100] "But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew."[101] Despite the congressional attempts to make state compensation the remedy for land-based workers, the Court concluded: "We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."[102] The word "seamen" was consequently interpreted "to include stevedores employed in maritime work on navigable waters."[103]

Within six months of the *Haverty* decision, Congress passed a uniform federal compensation act for land-based maritime workers, the Longshoremen's and Harbor Workers' Compensation Act.[104] The Act

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97. *Id.* at 227-28. The policy reasons for striking down the Statute were stated as follows:
> This cause presents a situation where there was no attempt to prescribe general rules. On the contrary, the manifest purpose was to permit any state to alter the maritime law, and thereby introduce conflicting requirements. To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the states may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme.

Id. at 228.

98. 272 U.S. 50 (1926).

99. *Id.* at 52.

100. *See supra* text accompanying note 66.

101. *Haverty*, 272 U.S. at 52.

102. *Id.* Other courts have noted the major differences between longshoremen and seamen, including the seamen's surrender of personal rights and liberties, the longshoremen's right to walk off the job, the seamen's compelled duty and in the past the flogging and other punishment of seamen. *See, e.g.*, Johnson v. American-Hawaiian S.S. Co., 14 F.2d 534, 534 (W.D. Wash. 1926); Gonzales v. United States Shipping Bd., Emergency Fleet Corp., 3 F.2d 168, 169 (E.D.N.Y. 1924); C. Flanagan & Sons, Inc. v. Carken, 11 S.W.2d 392, 394 (Tex. Civ. App.—Beaumont 1928, no writ).

103. *Haverty*, 272 U.S. at 52.

104. Act of March 4, 1927, ch. 509, 44 Stat. 1424 (codified as amended at 33 U.S.C. §§

provided the exclusive remedy against a worker's employer if he was injured "upon the navigable waters of the United States (including any dry dock)."[105] As was the case in the 1922 Statute, the Act excluded "a master or member of a crew of any vessel" from its coverage.[106]

At one point in the legislative proceedings, seamen were included in the Act out of fear that the Supreme Court might again strike down the Statute without them. Opposition from seamen[107] led Congress to return to its original intent which was to give land-based workers the same type of treatment as their similarly-situated neighbors who were subject to state compensation:

> Now, our committee framed one bill called the House bill. Under that the committee was reluctant to take up the inclusion of seamen. Afterwards, when the Senate bill came to us, the question was reopened and rediscussed, and under the dicta of the decision of the Supreme Court it was felt that perhaps this very bill might be imperiled if we did not have uniformity. That is what the judges have all cried for. That is why they have declared unconstitutional in two cases acts of Congress attempting to give these laboring men compensation.
>
> In obedience to that thought, the committee instructed its chairman to prepare a bill including seamen. That was done. . . . As the opposition came in such a reasonable manner I felt constrained to yield to it, and went back to the committee and stated the conditions, and asked them to authorize the elimination of the seamen from the bill. That was unanimously granted . . . .[108]

The passage of the LHWCA did not prevent the Supreme Court from extending its treatment of land-based workers as seamen. After the Court granted certain longshoremen and harbor workers a seaworthiness action against the vessel owner,[109] Congress amended the Act in 1972[110] and

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901-50 (1976)) [hereinafter referred to as LHWCA].

105. *Id.* § 3(a). As originally passed, the coverage provisions were limited to situations in which recovery for the injury or death could not "validly be provided by State law." *Id.*; see Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962) for the judicial gloss on this limitation.

106. 33 U.S.C. §§ 902(3), 903(a)(1).

107. *See* 68 CONG. REC. 2191-92 (1927).

108. *Id.* at 5410 (statement of Rep. Graham). One commentator has suggested: "Critics are wrong when they assert that the Harbor Workers' Act indicates congressional intent to treat harbor workers separately." Comment, *Risk Distribution and Seaworthiness*, 75 YALE L.J. 1175, 1184 n.49 (1966). He notes that seamen would have been included in the Act had it not been for the opposition of the seamen's unions. *Id.* This ignores the fact that in 1922 Congress had tried to treat land-based workers and seamen differently, but the attempt had been struck down by the Supreme Court in *Dawson*. In order to provide some sort of compensation remedy for land-based workers along the lines of state compensation, Congress was willing to consider the inclusion of seamen in order to obtain the approval of the Supreme Court. It is also important to note that the ultimate result *was* the exclusion of seamen from the bill despite the fear that the legislation might be held unconstitutional.

109. *See infra* text accompanying notes 191-212. The vessel owner was then permitted to recover over against the longshoreman's employer. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 132-34 (1956). Further impetus for the 1972 Amendments was the

eliminated the seaworthiness action for workers covered by the Act.[111] Once again Congress instructed the Supreme Court in its intent that seamen and land-based workers be treated differently:

> In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.[112]

After eliminating the seaworthiness warranty from land-based workers, Congress substituted a negligence action[113] so that these workers would be in the same position as other workers in non-maritime pursuits:

> This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.
>
> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.[114]

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shoreside limitation on coverage of the LHWCA explained by the Supreme Court in Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969).

110. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (1972).

111. 33 U.S.C. § 905(b). Several other changes were made in the 1972 Amendments. Coverage of the Act was extended shoreside, *id.* §§ 902(4), 903(a); compensation benefits were increased, *id.* §§ 6, 8, 9, 10; administrative changes in claim-handling procedures were made, *id.* §§ 7, 13(a), 19(d), 21, 21a, 28, 33(g), 39(c), 44, 49; a negligence remedy was established against the vessel, *id.* § 905(b); and indemnification of the vessel by the worker's employer was eliminated. *Id.*

112. S. Rep. No. 1125, 92d Cong., 2d Sess. 9-10 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 6 (1972).

113. 33 U.S.C. § 905(b).

114. S. Rep. No. 1125, *supra* note 112, at 10; H.R. Rep. No. 1441, *supra* note 112, at 6. This concept was repeated several times in the committee reports:

> The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

S. Rep. No. 1125, *supra* note 112, at 8; H.R. Rep. No. 1441, *supra* note 112, at 4. "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work." S. Rep. No. 1125, *supra* note 112, at 10; H.R. Rep. No. 1441, *supra* note 112, at 6.

> Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues

After the several battles with the Supreme Court in providing remedies for seamen and land-based maritime workers, the intent of Congress was clear and the Jones Act and LHWCA were finally upheld by the Supreme Court.[115] The application of the legislation was in the hands of the judiciary.

IV. SUPREME COURT INTERPRETATION

The Jones Act provides a remedy for "any seaman," and the LHWCA provides a compensation remedy for maritime workers who are not "a master or member of a crew of any vessel." Neither Act defines these terms, and the LHWCA does not expressly indicate its effect on the Jones Act. The relationship between the two Statutes was addressed[116] by the Supreme Court in *Swanson v. Marra Brothers, Inc.*[117] A longshoreman who was injured on the dock sued his employer, a stevedoring company, under the Jones Act. Prior to the passage of the LHWCA, the Supreme Court considered such accidents to fall within the coverage of the

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can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

S. REP. No. 1125, *supra* note 112, at 11; H.R. REP. No. 1441, *supra* note 112, at 7.

115. Panama R.R. v. Johnson, 264 U.S. 375, 391-93 (1924) (Jones Act); Crowell v. Benson, 285 U.S. 22, 37-65 (1932) (LHWCA).

116. The Supreme Court first had to decide the cases brought under the Jones Act which arose prior to the passage of the LHWCA. *See* Jamison v. Encarnacion, 281 U.S. 635 (1930); Northern Coal & Dock Co. v. Strand, 278 U.S. 142 (1928); *see also* Uravik v. F. Jarka Co., 282 U.S. 234 (1931). Subsequently, a worker injured on a car float used to transport railroad cars was restricted to his remedy under the LHWCA in Nogueira v. New York, N.H. & H. R.R., 281 U.S. 128, 134-38 (1930), and the master of a tug was held to fall within the Jones Act in Warner v. Goltra, 293 U.S. 155, 162 (1934). In *Warner* the Court sought guidance in 46 U.S.C. § 713 (1976) which defines "master" and "seaman" as follows:

> In the construction of title 53 of the Revised Statutes, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the "master" thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a "seaman" . . . .

Warner, 293 U.S. at 160-62. The term "seaman" was thus given a broad reading by the Court. *Id.* at 159. Since the LHWCA excluded the "master or member of a crew of any vessel," the Court was convinced that Congress intended to cover the master of a vessel under the Jones Act. *Id.* at 159-60. *See infra* text accompanying notes 122-38 for a discussion of Norton v. Warner Co., 321 U.S. 565 (1944); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940).

117. 328 U.S. 1 (1946).

Jones Act, as the longshoreman was a seaman.[118] The Court set out the effect of the LHWCA on the Jones Act:

> We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the Haverty Case only such rights to compensation as are given by the Longshoremen's Act.[119]

The LHWCA left "unaffected the rights of members of the crew of a vessel to recover under the Jones Act when injured while pursuing their maritime employment whether on board or onshore."[120] As a longshoreman, however, Swanson was excluded from the coverage under the Jones Act.[121]

In *South Chicago Coal & Dock Co. v. Bassett*,[122] the Supreme Court began the task of determining who is covered under the Jones Act as a "member of a crew."[123] A deckhand on a lighter used for fueling steamships with coal drowned, and his widow sought compensation under the LHWCA. The decedent's chief task was to facilitate the flow of coal to the vessel being fueled.[124] Additional duties included throwing lines and some cleaning on the vessel.[125] The Court prophetically set the stage for the future of seaman status cases: "The word 'crew' does not have an absolutely unvarying legal significance."[126] But after reviewing some of the standards used in earlier decisions,[127] the Court adopted an "aid in navigation" test to define those workers who were not excluded from the Jones Act by the LHWCA:

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118. *See supra* text accompanying notes 98-103.
119. *Swanson*, 328 U.S. at 7.
120. *Id.* at 7-8 (citations omitted).
121. *Id.* at 6. Since Swanson was injured on the dock and not on navigable waters, he was not covered under the LHWCA. *Id.* at 7. His remedy was therefore pursuant to "local law." *Id.*
122. 309 U.S. 251 (1940).
123. The Court also discussed the effect of the LHWCA on the Jones Act:
> We think it is clear that Congress in finally adopting the phrase "a master or member of a crew" in making its exception, intended to leave to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation statutes were inapplicable.

Id. at 257 (footnote omitted).
124. His "primary duty" was to remove obstructions from the coal and to free the coal when it got stuck. *Id.* at 255.
125. *Id.*
126. *Id.* at 258.
127. The Court noted Justice Story's "ship's company" language in United States v. Winn, 28 F. Cas. 733, 737 (D. Mass. 1838)(No. 16,740) and the "aid in navigation" definition of crewmembers in The BOUND BROOK, 146 F. 160, 164 (D. Mass. 1906) and in The BUENA VENTURA, 243 F. 797, 800 (D. Mass. 1917). In *The BOUND BROOK*, the court stated: "When the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board." The BOUND BROOK, 146 F. at 164.

> This Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen, were still regarded as distinct from members of a "crew." They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel *who are naturally and primarily on board to aid in her navigation.*[128]

Although the decedent was a member of the complement of deckhands on the vessel, the Court emphasized his "primary duty" of facilitating the flow of coal.[129] He slept at home and was an hourly worker.[130] The Court concluded that the decedent was excluded from the Jones Act, since he was "in the position of longshoremen or other casual workers on the water."[131]

Four years after *Bassett*, the Supreme Court began the expansion of its aid in navigation test for seaman status. In *Norton v. Warner Co.*,[132] a boatman on a barge was injured while shifting the barge at a pier. The claimant's duties consisted of taking general care of the barge; he ate and slept on the barge and he had no duties ashore.[133] In determining whether his remedy fell under the Jones Act or LHWCA, the Supreme Court noted its aid in navigation test from *Bassett*,[134] but the Court began to confuse the terms seaman and member of a crew. Although the Court acknowledged that the term seaman "may" have a broader meaning than crewmember,[135] the Court expanded its definition of *crewmember* to encompass the test for *seaman* status that had been developed prior to the passage of the Jones Act and LHWCA:

> But navigation is not limited to "putting over the helm." It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can "hand, reef and steer." Judge Hough pointed out in *The Buena Ventura* that "every one is entitled to the *privilege of a seaman who, like seamen*, at all times contributes to and labors about the operation and welfare of the ship when she is upon a voyage."[136]

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128. *Bassett*, 309 U.S. at 260 (emphasis added)(citation omitted).
129. *Id.*
130. *Id.*
131. *Id.* (quoting Scheffler v. Moran Towing & Transp. Co., 68 F.2d 11, 12 (2d Cir. 1933)). Since the case originated as a claim for compensation under the LHWCA, a deputy commissioner made the fact finding whether the decedent was a member of the crew and thus excluded from coverage of that Act. *Bassett*, 309 U.S. at 257. The Supreme Court pointed out that if there was evidence to support the finding, it was conclusive. *Id.* at 258.
132. 321 U.S. 565 (1944).
133. *Id.* at 567-68.
134. *Id.* at 571-72.
135. *Id.* at 572 n.5 (citing *Haverty*, 272 U.S. 50).
136. *Norton*, 321 U.S. at 572 (emphasis added)(citation omitted)(quoting The BUENA VENTURA, 243 F. at 799).

The Court concluded: "We think that 'crew' must have at least as broad a meaning under the Act."[137] The Court pointed out that the claimant had "that permanent attachment to the vessel which commonly characterizes a crew,"[138] but by incorporating into the definition of crewmember concepts used to define seaman, the Court began the process of chipping away at Congress' intended coverage under the LHWCA.

The *Bassett* and *Norton* cases established "aid in navigation" and "permanent attachment" tests for seaman status. A third requirement was promulgated in *Desper v. Starved Rock Ferry Co.*[139] The defendant in *Desper* operated a small fleet of sightseeing motorboats in the Illinois River during the summer months. Desper was employed in April, 1947 to help prepare the vessels for the summer season, and he worked as a boat operator during the summer. After the season closed, he helped prepare the boats for winter storage on land, and his employment terminated in December.[140] Desper was re-employed the following March to prepare the vessels for the coming season, but he was killed in the process.[141] After noting that his work at the time of the accident "was not that usually done by a 'seaman,' "[142] the Court emphasized that "there was no vessel engaged in navigation at the time of the decedent's death."[143] Thus, the Court held as a matter of law that Desper did not have seaman status.[144]

The addition of the "vessel engaged in navigation" test in *Desper* marked the end of the Supreme Court's formulation of standards to guide the lower courts in resolving seaman status questions. The years 1955 to 1958 brought four decisions from the Court which altered the relationship between the Jones Act and LHWCA and brought chaos to the determination of the remedies applicable to maritime workers.

Gianfala v. Texas Co.[145] involved an appeal from the Fifth Circuit,[146] which had reversed a judgment in favor of a worker on a barge. Oscar Martin died while unloading pipe from a vessel onto the drilling barge.[147] At the time of his accident the barge was engaged in drilling for oil and was sitting firmly on the bottom,[148] having been sunk by flooding compartments in the barge with water.[149] Martin's widow filed suit under the

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137. *Norton*, 321 U.S. at 572.
138. *Id.* at 573.
139. 342 U.S. 187 (1952).
140. *Id.* at 188.
141. *Id.* at 189.
142. *Id.* at 190.
143. *Id.* at 191.
144. *Id.* at 192.
145. 350 U.S. 879 (1955).
146. Texas Co. v. Gianfala, 222 F.2d 382 (5th Cir. 1955).
147. *Id.* at 384 n.2.
148. The drilling barge had been used only in the Lake Pelto-Bay Sainte Elaine-Lake Barre and Caillou Island Area. *Id.* at 384-85 n.2.
149. *Id.*

Jones Act, and the trial court entered a judgment in her favor based on a jury verdict.[150]

The evidence of seaman status in *Gianfala* came from one witness and was "undisputed, undiscredited and unimpeached."[151] Thus, the Fifth Circuit concluded that the issue of seaman status was not a question of fact for the jury but a question of law to be resolved by the judge.[152] On the testimony presented the Fifth Circuit concluded that the vessel was not in navigation and that as "*a member of a drilling crew*" Martin was not "*a member of a ship's crew.*"[153] Since the trial court entered its judgment that Martin was a seaman "*merely because the jury said he was,*" "ordinary principles governing the function of court and jury" had been "abandoned."[154]

The Supreme Court had a higher regard for the function of the jury in Jones Act cases and reversed the judgment of the Fifth Circuit.[155] Without explanation[156] the Court in two brief sentences remanded the case to the district court with directions to reinstate its judgment.[157]

The next decision from the Supreme Court, *Senko v. LaCrosse Dredging Corp.*,[158] provided more insight into the resolution of seaman status than *Gianfala*. Senko was employed as a handyman to assist in dredging a slough to bypass a rocky section in the Mississippi River. Again, the appellate court reversed a jury verdict in favor of the plaintiff.[159] Although the Supreme Court pointed out that it "does not normally sit to re-examine a finding of the type that was made below,"[160] the majority believed that the decision in *Bassett* had "not been fully understood."[161] The majority considered the holding in *Bassett* to be that "the determination of whether an injured person was 'a member of a crew' is to be left to the finder of fact."[162] This gave the jury the discretion to determine seaman status in the same manner as any other fact: "The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's esti-

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150. *Id.* at 385.
151. *Id.* at 384.
152. *Id.* at 386.
153. *Id.* at 387 (emphasis supplied).
154. *Id.* (emphasis supplied).
155. *Gianfala*, 350 U.S. at 879.
156. The Court did cite four cases to support its action: *Bassett*, 309 U.S. 251; Summerlin v. Massman Constr. Co., 199 F.2d 715 (4th Cir. 1952); Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir.), *cert. denied*, 346 U.S. 817 (1953); Gahagan Constr. Corp. v. Armao, 165 F.2d 301, 305 (1st Cir.), *cert. denied*, 333 U.S. 876 (1948).
157. *Gianfala*, 350 U.S. at 879.
158. 352 U.S. 370 (1957).
159. Senko v. La Crosse Dredging Corp., 7 Ill. App. 2d 307, 315, 129 N.E.2d 454, 458 (1955).
160. *Senko*, 352 U.S. at 373-74.
161. *Id.* at 374.
162. *Id.*

mate."[163] Therefore, the sole question should be "whether there is an evidentiary basis for the jury's finding."[164]

Senko performed substantially all of his duties "on or for the dredge," and the Supreme Court consequently considered him to be "permanently attached to and employed by the dredge as a member of its crew."[165] Additionally, his duties of cleaning the deck, splicing rope, stowing supplies and keeping the dredge "in shape" created a "normal inference" that Senko was responsible for the dredge's seaworthiness.[166] Adding his duties of taking soundings and cleaning navigation lights,[167] the Court concluded that "his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigation function when the dredge was put in transit."[168] Since this constituted evidence that Senko was "a member of the dredge's crew," the jury's verdict had to be sustained.[169]

In *Grimes v. Raymond Concrete Piling Co.*,[170] the defendant had been contracted by the United States to install a radar warning station known as a "Texas Tower" 110 miles seaward of Cape Cod. The Texas Tower was a triangular metal platform supported by three caissons which were permanently affixed to the ocean floor. Grimes was a pile driver who helped complete the tower in the shipyard and then lived and worked on the tower as it was towed to location. When the tower was anchored at its permanent site, Grimes performed only pile driving duties. Six days after the tower was placed in its permanent position, Grimes was sent to a nearby barge to prepare for transfer to the tower of construction materials transported on the barge. After working six hours on the barge, Grimes was injured while being transferred to the tower on a Navy life ring.[171] Grimes brought suit claiming seaman status as a crewmember of the barge servicing the tower and/or the Texas Tower.[172] Although the trial court considered that Grimes "might be regarded as a member of the crew of the barge,"[173] the judge granted an instructed verdict[174] on the ground that Grimés' exclusive remedy was under the Defense Base Act.[175]

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163. *Id.*
164. *Id.* at 372.
165. *Id.*
166. *Id.* at 372-73.
167. *Id.* at 373.
168. *Id.* at 374.
169. *Id.* There was no question raised whether there was a vessel engaged in navigation. *Id.* at 371 n.1.
170. 356 U.S. 252 (1958).
171. *Id.* at 254-55 (Harlan, J., dissenting).
172. Grimes v. Raymond Concrete Pile Co., 245 F.2d 437, 438 (1st Cir. 1957).
173. *Id.*
174. *Id.*
175. 42 U.S.C. §§ 1651-54 (1976). Section 1651 provides exclusive liability of the employer under the LHWCA for certain construction performed for the United States on the outer Continental Shelf, *inter alia*. Section 1654, however, excludes "a master or member of

The First Circuit affirmed the instructed verdict, but it did so because that court did not consider Grimes a seaman.[176] His presence on the barge for six hours was only "sporadic or temporary" and did not constitute "a more or less permanent connection" between Grimes and the barge.[177] Additionally, even if the Texas Tower might have been considered a vessel during the tow, the First Circuit concluded that "it had certainly ceased to be a vessel at the time of the accident."[178]

In the short Supreme Court opinion, one sentence was devoted to reversing the First Circuit on the seaman status issue: "We hold further, however, in disagreement with the Court of Appeals, that the petitioner's evidence presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of a crew of any vessel."[179] The Supreme Court did not state whether the barge, tower or both provided the seaman status, but by citing its decisions in *Senko*, *Gianfala* and *Bassett*,[180] the Court plainly indicated its displeasure with the instructed verdict in seamen's cases.

The final decision from the Supreme Court on seaman status came one week after *Grimes*. In *Butler v. Whiteman*[181] the defendant owned a wharf on the Mississippi River together with a barge which was moored to the wharf and a tug which was lashed to the barge.[182] The tug had no Coast Guard certificate and no steam had been raised on it during the year in which Butler's accident occurred.[183] Dupree Butler was engaged to clean the boilers on the tug in preparation for a Coast Guard inspection. Butler was last seen alive running across the barge to the tug, and it was the plaintiff's theory that he fell into the river between the tug and barge as a result of the defendant's failing to furnish a gangplank between them.[184]

The trial court granted an instructed verdict for the defendant which the Fifth Circuit affirmed because the tug was a "dead ship" with no crew.[185] The Supreme Court reversed and again explained in one sentence that the "evidence presented an evidentiary basis for jury findings as to (1) whether or not the tug "G. W. Whiteman" was in navigation; (2) whether or not the petitioner's decedent was a seaman and member of the

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a crew of any vessel" from the coverage under the Statute.

176. *Grimes*, 245 F.2d at 440.
177. *Id.*
178. *Id.*
179. *Grimes*, 356 U.S. at 253.
180. *Id.*
181. 356 U.S. 271 (1958).
182. *Id.* at 272 (Harlan, J., dissenting).
183. Harris v. Whiteman, 243 F.2d 563, 564 (5th Cir. 1957).
184. *Butler*, 356 U.S. at 272 (Harlan, J., dissenting).
185. *Harris*, 243 F.2d at 564. The Fifth Circuit also concluded that there could be no negligence because there was no room between the barge and tug in which Butler could have fallen into the water. *Id.*

crew of the tug within the meaning of the Jones Act . . . ."[186] As in *Grimes*, the Supreme Court in *Butler* cited its decisions in *Senko*, *Gianfala* and *Bassett*[187] as instruction to the lower courts to submit Jones Act cases to the jury rather than deciding them on a summary basis.

The decision in *Butler v. Whiteman* brought an end to the era of Supreme Court interpretation of seaman status. After fighting several losing battles with the Supreme Court, Congress had enacted legislation which covered members of a crew under the Jones Act and longshoremen and other harbor workers under the LHWCA. The passage of the LHWCA severely limited the coverage under the Jones Act, and the initial decisions of the Supreme Court in *Swanson*, *Bassett*, *Norton* and *Desper* delineated the boundaries of these Statutes and promulgated standards to guide the lower courts in cases brought by maritime workers. In its subsequent zeal to submit Jones Act cases to juries, however, the Supreme Court erased the line between the Jones Act and LHWCA in *Gianfala*, *Grimes* and *Butler*. The Court judicially overturned a substantial portion of the LHWCA coverage which supposedly restricted the Jones Act to the "master or member of a crew of any vessel." After this final series of Supreme Court decisions,[188] the term seaman would "mean nothing more than a person injured while working at sea."[189]

While the Supreme Court narrowed the coverage of the LHWCA by expanding the exception for crewmembers, the Court did not convert all longshoremen and harbor workers into seamen under the Jones Act.[190] The Court did, however, give many of the non-seamen the traditional maritime remedy of the warranty of seaworthiness. In *Seas Shipping Co. v. Sieracki*,[191] the Supreme Court extended its analysis in *Imbrovek*[192] that longshoremen perform seaman's work. Sieracki was a longshoreman and could not bring suit against his employer because of the exclusive liability provision in the LHWCA.[193] That Act did not expressly bar suits against the vessel owner,[194] however, and the Court resurrected its treat-

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186. *Butler*, 356 U.S. at 271 (citations omitted). The Court also concluded that there was evidence to support a finding that the employer's negligence played a part in producing Butler's death. *Id.*

187. *Id.* The Court also cited its decision the week before in *Grimes* and the decision of the First Circuit in Carumbo v. Cape Cod S.S. Co., 123 F.2d 991 (1st Cir. 1941).

188. Although the Supreme Court has addressed some related questions in subsequent decisions, the Court has refused to hear seaman status cases after *Butler*. *See, e.g.*, Braen v. Pfeifer Oil Transp. Co., 361 U.S. 129 (1959).

189. *Grimes*, 356 U.S. at 255 (Harlan, J., dissenting).

190. In addition to *Bassett*, *Swanson* and *Desper*, see, *e.g.*, Pennsylvania R.R. v. O'Rourke, 344 U.S. 334 (1953); Parker v. Motor Boat Sales, 314 U.S. 244 (1941); Nogueira v. New York, N.H. & H. R.R., 281 U.S. 128 (1930).

191. 328 U.S. 85 (1946).

192. *See supra* text accompanying notes 62-66.

193. The exclusive liability provision is currently codified at 33 U.S.C. § 905(a).

194. "Congress by that Act [LHWCA] not only did not purport to make the stevedore's remedy for compensation against his employer exclusive of remedies against others. It ex-

ment of longshoremen as seamen: "For these purposes he is, in short, a seaman because he is doing seaman's work and incurring a seaman's hazards."[195] One of the "protections" imposed by the law "incidental to the performance of that service" is the warranty of seaworthiness.[196] Thus, even though excluded from seaman status under the Jones Act, a class of workers performing seaman's work attained quasi-seaman status and became known as "*Sieracki* seamen."[197]

After the expansion in the 1940's and 1950's, the year 1959 brought a retrenchment in the broadening of seaman and quasi-seaman status. The trend began with *United New York and New Jersey Sandy Hook Pilots Association v. Halecki*.[198] An electrician was killed while assisting in overhauling the generators on a pilot boat. Ignoring the language in *Sieracki* that seaman status is based upon "incurring a seaman's hazards,"[199] the Court focused on the nature of the service performed by the worker. The electrical work in dismantling the generators required special skill and special equipment.[200] This was not the type of work performed by crewmembers of the vessel, and consequently the warranty of seaworthiness was not owed to the electrician.[201]

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pressly reserved to the stevedore a right of election to proceed against third persons responsible for his injury . . . ." *Sieracki*, 328 U.S. at 101 (footnote omitted). The Supreme Court discussed the effect of the LHWCA on its *Haverty* decision:

> The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner. The statute had no purpose or effect to alter the stevedore's rights as against any but his employer alone. Beyond that consequence, moreover, we think it had none to alter either the basic policy or the rationalization of the Haverty decision. Because the recovery under the Merchant Marine Act of 1920 was limited to the employer, the necessary effect of the Longshoremen's and Harbor Workers' Act, likewise so limited, was to substitute its remedy for that provided under the preexisting legislation and the Haverty decision's construction of it. There was none to nullify the basic and generally applicable policy of that decision or to affect the validity of its foundations in other applications.

Id. at 102.

195. *Id.* at 99.

196. *Id.* at 100.

197. *Sieracki* seamen were not crewmembers and therefore were not Jones Act seamen. They were not entitled to maintenance and cure, and they had a negligence remedy against the vessel owner. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 413 (1953).

198. 358 U.S. 613 (1959).

199. *See supra* text accompanying note 195. See also *Pope & Talbot, Inc. v. Hawn*, 346 U.S. at 413, in which the Supreme Court stated the following in support of its holding that the warranty of seaworthiness extended to a carpenter:

> His need of protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subject to the same danger. All were entitled to like treatment under law.

200. *Halecki*, 358 U.S. at 617.

201. *Id.* at 618. The Court stated the justification for the absolute and nondelegable duty

The last decision of the Supreme Court which denied a worker seaman status under the Jones Act, *Desper v. Starved Rock Ferry Co.*, was based upon the absence of a "vessel engaged in navigation."[202] This analysis was applied to *Sieracki* seaman in *West v. United States*.[203] A "Liberty" ship built during World War II had been totally deactivated for several years in the "moth-ball fleet."[204] In 1951 a contractor was hired to reactivate the vessel and prepare her for sea duty. West was employed by the contractor and was injured while working inside the low pressure cylinder of the ship's main engine.[205] In holding that the vessel was not "in maritime service"[206] so as to give rise to a warranty of seaworthiness, the Court stated:

> It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury.[207]

In *Roper v. United States*,[208] a longshoreman was injured on a previously mothballed liberty ship which was being used for storage of grain.[209] The "ship" was towed to and from a grain elevator to load and discharge the grain, but the Supreme Court did not consider this a "navigational use."[210] Its movement was not to transport cargo but to move it out of the way so that it could act as a warehouse.[211] Since it was not a "vessel in navigation," no warranty of seaworthiness was owed.[212]

After its era of resurrecting the Jones Act from the restrictions placed upon it by Congress in the LHWCA, the Supreme Court recanted slightly in the *Sieracki* seaman cases, *Halecki*, *West* and *Roper*. The penultimate sentence in the majority opinion in *Roper* indicates that the Court considered its analysis in these cases to be applicable in Jones Act cases as well: "This limitation is analogous to that applied in libels under the Jones Act, where it has long been held that recovery is precluded if the ship is not a vessel in navigation."[213] Since the Supreme Court has

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owed by the vessel owner: "He [the seaman] is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers." *Id.* at 616-17 (quoting Mahnich v. Southern S.S. Co., 321 U.S. 96, 103 (1944)).

202. *See supra* text accompanying notes 139-44.
203. 361 U.S. 118 (1959).
204. *Id.* at 119.
205. *Id.* at 120.
206. *Id.* at 122.
207. *Id.*
208. 368 U.S. 20 (1961).
209. *Id.* at 21.
210. *Id.* at 23.
211. *Id.*
212. *Id.* at 23-24.
213. *Id.* at 24.

not written an opinion on Jones Act seaman status since the 1950's, the battlefield has moved to the lower courts.

After the Supreme Court bowed out of the seaman status arena, Congress intervened in 1972 to remove from land-based maritime workers the seaman's remedy of the warranty of seaworthiness granted them by the Supreme Court in *Sieracki*. The LHWCA had been passed in 1927 to overrule *Haverty* which had given those laborers status under the Jones Act.[214] The Supreme Court restored a portion of their status by granting them a seaworthiness warranty against the vessel owner in *Sieracki*,[215] but Congress removed this action in order to return land-based workers to land-based remedies.[216] With this amendment, Congress joined the Supreme Court in leaving the determination of the status of maritime workers to the lower courts.

V. THE JONES ACT DEFENDANT

The Jones Act specifies that an action may be brought by "any seaman,"[217] and the LHWCA has limited the class of seamen covered to "a master or member of a crew of any vessel."[218] The Jones Act does not, however, specify the party who is liable to the seaman. The only guidance comes at the beginning and end of the Statute which provides that the injury must occur "in the course of his employment" and that "[j]urisdiction" shall be in the district in which the "defendant employer" resides or has his principal office.[219]

The leading case is *Cosmopolitan Shipping Co. v. McAllister*[220] in which the Supreme Court addressed the question whether a general agent for the vessel owner could be held liable under the Jones Act. In order to resolve the issue, the Court had to determine who is the proper Jones Act defendant. The Court stated: "As § 33 shows on its face, a seaman has the advantages of the Act only against his employer."[221] The majority also had "no doubt that under the Jones Act only one person, firm, or corporation can be sued as employer."[222] After this discussion, however, the Court pointed out that the defendant's duties were limited to those of a ship's husband and did not include "actual management or navigation of the vessel."[223] Some commentators have seized upon this gratuitous lan-

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214. *See supra* text accompanying notes 98-103.
215. *See supra* text accompanying notes 191-97.
216. *See supra* text accompanying notes 110-14.
217. 46 U.S.C.A. § 688(a).
218. 33 U.S.C. §§ 902(3), 903(a)(1).
219. 46 U.S.C.A. § 688(a). The recent amendment to the Jones Act speaks of a worker "in the employ of an enterprise . . . ." *Id.* § 688(b).
220. 337 U.S. 783 (1949).
221. *Id.* at 787 n.6.
222. *Id.* at 791.
223. *Id.* at 796; *see also id.* at 798.

guage in Justice Reed's majority opinion to downgrade to the status of dictum his direct statements about the necessity of an employment relation and to conclude that this is an open issue.[224] After a period of initial confusion, the lower courts have almost uniformly adopted Justice Reed's "dictum."

Problems with the proper Jones Act defendant normally arise in the situation in which one or more independent contractors employ persons on vessels owned by third parties. Some of the initial lower court decisions contain language indicating that the defendant must control or operate the vessel on which the worker is claiming crewmember status.[225] The issue was presented[226] to the Fifth Circuit in *Barrios v. Louisiana Construction Materials Co.*[227] Nolan Barrios was employed by Williams-McWilliams Industries[228] to serve as an oiler on a dragline which was rented from A.O. Rappelet. The dragline was loaded on a spud barge owned by Rappelet in order to perform construction work on a flood protection levee, and Barrios was injured on the barge.[229] The jury found that both Williams-McWilliams and Rappelet were negligent and that the barge, operated by Rappelet, was unseaworthy.[230] Williams-McWilliams argued that it could not be liable under the Jones Act, since the jury found that it was not the operator of the barge. The Fifth Circuit rejected the argument, because rather than control over the vessel, the key is "control over the operations which resulted in the injury to Barrios."[231] The court concluded:

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224. *See, e.g.*, G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-21(a) (2d ed. 1975).

225. *See, e.g.*, Thomas v. Peterson Marine Serv., 411 F.2d 592, 593 (5th Cir. 1969) ("he was not employed by the owner of the vessel"), *cert. denied*, 396 U.S. 1006 (1970); Williamson v. Daspit Bros. Marine Divers, Inc., 337 F.2d 337, 339 (5th Cir. 1964) (the jury was instructed to decide "whether or not that vessel was under the control or command or operated by" the defendant); Case v. St. Paul Fire & Marine Ins. Co., 324 F. Supp. 352, 353 (E.D. La. 1971) ("Actually, the Jones Act claim could and should have been dismissed also on the ground that since Noble did not own or operate the vessel in question, there was no employee-employer shipowner or operator relationship required by the Jones Act."), *appeal dismissed*, 456 F.2d 252 (5th Cir. 1972).

226. Several district courts had previously held that when the employer and vessel owner are different, the party liable for maintenance and cure and for negligence under the Jones Act is the seaman's employer. Sims v. Marine Catering Serv., 217 F. Supp. 511, 516-17 (E.D. La. 1963); Williams v. Milwhite Sales Co., 197 F. Supp. 730, 732 (E.D. La. 1961); *cf.* Smith v. Brown & Root Marine Operators, Inc., 243 F. Supp. 130, 132 (W.D. La. 1965), *aff'd sub nom.* Underwater Servs. v. Brown & Root Marine Operators, Inc., 376 F.2d 852 (5th Cir. 1967).

227. 465 F.2d 1157 (5th Cir. 1972).

228. Barrios had been employed by Rappelet but was hired by Williams-McWilliams because he was familiar with the equipment. The jury found Barrios was acting in the course and scope of his employment for Williams-McWilliams at the time of his accident. *Id.* at 1159, 1161 n.2.

229. *Id.* at 1160.

230. *Id.* at 1160-61 n.2.

231. *Id.* at 1164; *cf.* Trautman v. Buck Steber, Inc., 693 F.2d 440, 443-46 (5th Cir. 1982).

> The jury found that Barrios was employed by Williams-McWilliams and assigned to duties which bore a sufficiently permanent connection to the spud barge to qualify Barrios as a member of its crew. In addition the jury found that Williams-McWilliams supervised the particular operations which gave rise to Barrios' injury and that the negligence of Williams-McWilliams was a cause of the injury. Where the plaintiff has established these traditional elements of a Jones Act recovery, it would be a strained and artificial construction of the Act to impose any additional requirement that the defendant have operational control over the entire vessel.[232]

In summary, the Fifth Circuit affirmed the trial court judgment imposing liability on the employer, Williams-McWilliams, for negligence under the Jones Act and maintenance and cure under the general maritime law[233] and against the vessel owner and operator, Rappelet, for negligence and unseaworthiness.[234]

Shortly after *Barrios* the Second Circuit was faced with the same issue in *Mahramas v. American Export Isbrandtsen Lines*.[235] Anna Mahramas was employed by House of Albert which operated the barber and beauty shops on American Export Isbrandtsen Lines' passenger liners. Mahramas shared a cabin with another House of Albert employee, and was allegedly injured while using the ladder to her upper berth when its bottom step gave way.[236] As to the vessel owner, the Second Circuit had no doubt that Mahramas had the remedies of the warranty of seaworthiness[237] and general maritime negligence.[238] The major question on appeal involved the party responsible for maintenance and cure and Jones Act negligence. After holding Mahramas a seaman,[239] the court concluded: "There has never been any question that the Jones Act applies only between employees and their employers, and the Supreme Court made explicit in Cosmopolitan Shipping Co. v. McAllister, that only one person, be it an individual or a corporation, could be sued as the em-

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232. *Barrios*, 465 F.2d at 1166.

233. *Id.* at 1167.

234. *Id.* at 1159, 1166-67. The Fifth Circuit also affirmed the award of indemnity to Rappelet against Williams-McWilliams based on the finding that Rappelet's negligence was passive and Williams-McWilliams negligence was active. *Id.* at 1166-67.

235. 475 F.2d 165 (2d Cir. 1973). In its prior decision, Schiemann v. Grace Line, 269 F.2d 596 (2d Cir. 1959), the Second Circuit was faced with a similar employment relationship. The only issue in *Schiemann*, however, was whether the worker could maintain an action against the *vessel owner*. The court held that he could not because he was not employed by the vessel owner. *Id.* at 597-98.

236. *Mahramas*, 475 F.2d at 167.

237. *Id.* at 169 (citing Seas Shipping Co. v. Sieracki, 328 U.S. 85, 95 (1946)).

238. "[T]he owner of the ship owes a duty of reasonable care 'to all who are on board for purposes not inimical to [the shipowner's] legitimate interest.' " *Mahramas*, 475 F.2d at 169 (quoting Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959)).

239. *Mahramas*, 475 F.2d at 170.

ployer."[240] Thus, since House of Albert was Mahramas' employer,[241] the Jones Act did not extend to the shipowner American Export Isbrandtsen Lines.[242] House of Albert raised the argument that the Jones Act could not apply to it because it was not a "*shipowner*-employer."[243] This position had been advocated by some commentators,[244] but like the Fifth Circuit in *Barrios*, the Second Circuit rejected the argument.[245] As to maintenance and cure, House of Albert as employer was responsible since "the right arises out of and is implied in the contract of employment."[246]

With the exception of a few aberrations,[247] the breakdown of obligations in *Barrios* and *Mahramas* has been consistently followed: Jones Act negligence and maintenance and cure owed by the employer and the warranty of seaworthiness owed by the vessel owner or operator.[248] The major areas of dispute generally involve who is the Jones Act employer[249] and

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240. *Id.* (citations and footnote omitted).

241. *Id.* at 171.

242. *Id.* at 170.

243. *Id.* at 170-71 (emphasis supplied).

244. *See, e.g.*, G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-21, at 285 (1st ed. 1957).

245. *Mahramas*, 475 F.2d at 171. The Second Circuit noted that when the Supreme Court had incorporated longshoremen's actions against their employer, the stevedore, into the Jones Act, the Supreme Court had not considered it necessary that the employer own the vessel. *See Sieracki*, 328 U.S. at 99-100; *Haverty*, 272 U.S. at 52.

246. *Mahramas*, 475 F.2d at 170.

247. *See, e.g.*, Constance v. Johnston Drilling Co., 422 F.2d 369, 370 (5th Cir. 1970) ("Johnston had breached its duty as a Jones Act employer to provide a seaworthy vessel."); Davis v. Associated Pipe Line Contractors, Inc., 305 F. Supp. 1345, 1352 (W.D. La. 1968) ("This duty to provide a seaworthy vessel and a safe place to work . . . is an obligation of the owner of the vessel to the employee of an independent contractor and is also an obligation of the seaman's employer."), *aff'd*, 418 F.2d 920 (5th Cir. 1969), *cert. denied*, 397 U.S. 988 (1970).

248. *See, e.g.*, Parks v. Dowell Div. of Dow Chem. Corp., 712 F.2d 154, 156, 157-58 (5th Cir. 1983); Baker v. Raymond Int'l, Inc., 656 F.2d 173, 177-85 (5th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982); Roberts v. Williams-McWilliams Co., 648 F.2d 255, 262-63 (5th Cir. 1981); Guidry v. South La. Contractors, Inc., 614 F.2d 447, 452 (5th Cir. 1980); Simko v. C & C Marine Maintenance Co., 594 F.2d 960, 963 nn.2 & 3 (3d Cir.), *cert. denied*, 444 U.S. 833 (1979); Davis v. Hill Eng'g, Inc., 549 F.2d 314, 326, 329 (5th Cir. 1977); Spinks v. Chevron Oil Co., 507 F.2d 216, 224-26 (5th Cir. 1975); Dugas v. Pelican Constr. Co., 481 F.2d 773, 777-78 (5th Cir.), *cert. denied*, 414 U.S. 1093 (1973); Savard v. Marine Contracting Inc., 471 F.2d 536, 540-42 (2d Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); Burns v. Anchor-Wate Co., 469 F.2d 730, 731, 732-33 (5th Cir. 1972); Landry v. Oceanic Contractors, Inc., 548 F. Supp. 337, 342, 344-45 (E.D. La. 1982); Lowe v. California Co., 296 F. Supp. 1264, 1267-68 (E.D. La. 1969); Smith v. Brown & Root Marine Operators, Inc., 243 F. Supp. at 132; Brown & Root, Inc. v. DeSautell, 554 S.W.2d 764, 766 (Tex. Civ. App.—Houston [1st Dist] 1977, writ ref'd n.r.e.). Of course no seaworthiness warranty is owed by charterers who do not own or operate the vessel. *See, e.g.*, Kelloch v. S & H Subwater Salvage, Inc., 473 F.2d 767, 768-69 (5th Cir. 1973); Presley v. CARRIBEAN SEAL, 537 F. Supp. 956, 965 (S.D. Tex. 1982), *rev'd on other grounds sub nom.* Presley v. Vessel CARRIBEAN SEAL, 709 F.2d 406 (5th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3509 (U.S. Jan. 9, 1984).

249. The disputes often arise in the complicated context of the borrowed servant rule.

how many employers can be responsible under the Jones Act.

Following the straightforward language used by Justice Reed in *McAllister*,[250] most courts have held that there can be only one Jones Act employer and have rejected arguments seeking to impose Jones Act liability against more than one party.[251] In *Spinks v. Chevron Oil Co.*,[252] however, the Fifth Circuit added considerable confusion to the issue. Donnie Spinks was employed by Labor Services and was injured aboard a Chevron drilling barge when he slipped on soap he was using to clean oil from the deck. Spinks filed suit against Chevron and Labor Services but invoked the Jones Act against only the latter.[253] The trial court dismissed the Jones Act claim because Spinks was the borrowed employee of Chevron.[254] The Fifth Circuit initially reasoned that when a seaman is a borrowed servant of an employer, he does not cease to be his immediate employer's servant.[255] The court did not disagree with the district court's holding that Spinks was a borrowed servant of Chevron. "We merely hold that under the Jones Act, Labor Services remained his employer."[256]

After finding two employers, the Fifth Circuit had to deal with *McAllister*. The Fifth Circuit's characterization of that opinion foretold its holding: "Much of the difficulty in this area stems from the Supreme Court's dictum in Cosmopolitan Shipping Co. v. McAllister, that '. . . under the Jones Act only one person, firm, or corporation may be sued as employer'."[257] The Fifth Circuit responded: "If this means that an injured seaman must speculate at his peril on whether the trial court ultimately will find him a borrowed employee of the shipowner, or an employee of his immediate employer, we reject the theory."[258] Noting that a single employer rule might result in contractual manipulation that would defeat Jones Act rights, the court saw "nothing offensive" in permitting a seaman to sue both potential employers in the alternative and having the defendants sort out between themselves which will bear the final cost of

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See, e.g., Baker v. Raymond Int'l, Inc., 656 F.2d at 178-79; Roberts v. Williams-McWilliams Co., 648 F.2d at 260-62; Guidry v. South La. Contractors, Inc., 614 F.2d at 452-55; Simko v. C & C Marine Maintenance Co., 594 F.2d at 963 n.3; Spinks v. Chevron Oil Co., 507 F.2d at 224-26; Dugas v. Pelican Constr. Co., 481 F.2d at 778; Savard v. Marine Contracting Inc., 471 F.2d at 541; Porche v. Gulf Miss. Marine Corp., 390 F. Supp. 624, 629 (E.D. La. 1975); Hebert v. California Oil Co., 280 F. Supp. 754, 760-61 (W.D. La. 1967); *cf.* Ruiz v. Shell Oil Co., 413 F.2d 310, 312-14 (5th Cir. 1969).

250. *See supra* text accompanying note 222.

251. *See, e.g., Mahramas*, 475 F.2d at 170; Savard v. Marine Contracting Inc., 471 F.2d at 541.

252. 507 F.2d 216 (5th Cir. 1975).

253. *Id.* at 219, 221.

254. *Id.* at 221. The trial court gave the additional reason that Labor Services was not the owner or operator of the vessel. The Fifth Circuit also rejected this reason. *Id.* at 224.

255. *Id.* at 224.

256. *Id.* at 225 (footnote omitted).

257. *Id.* (citation and footnote omitted) (quoting *McAllister*, 337 U.S. at 791).

258. *Spinks*, 507 F.2d at 225.

recovery.[259] Thus, Spinks was permitted to pursue his Jones Act claim against Labor Services despite being a borrowed employee of Chevron.[260]

With the exception of the dual employer analysis in *Spinks*[261] the remedies against employers and vessel owners have been set out by the lower courts with a degree of uniformity. Such is not the case in determining who has the status of a member of a crew of a vessel.

VI. WHO IS A MEMBER OF A CREW

The term "seaman" has been defined by Congress in terms of "every person . . . who shall be employed or engaged to serve in any capacity on board . . . ."[262] Because the LHWCA restricts the seamen covered under the Jones Act to "a master or member of a crew of any vessel,"[263] the issue which must be answered is who are the crewmembers?[264] "[O]thers who may work on the vessel" are not entitled to the protection of the Jones Act.[265] Since only seamen who are crewmembers can recover under the Jones Act, most courts use the terms interchangeably.[266] With the passage of time, however, the equating of "seaman" with "crewmember" has often meant that the term "crewmember" has been expanded to incorporate the definition of "seaman."[267] Some decisions have so confused the terms as to dispose of the crewmember restriction altogether and have reverted to the expansive definitions of seaman.[268] This extension of

259. *Id.*

260. *Id.* at 225-26.

261. *See also* Baker v. Raymond Int'l, Inc., 656 F.2d at 178; Guidry v. South La. Contractors, Inc., 614 F.2d at 452.

262. 46 U.S.C. § 713 (1976).

263. 33 U.S.C. §§ 902(3), 903(a)(1). *See* Swanson v. Marra Bros., 328 U.S. 1, 5 (1946); Guidry v. South La. Contractors, Inc., 614 F.2d 447, 452 n.2 (5th Cir. 1980); Whittington v. Sewer Constr. Co., 541 F.2d 427, 436 (4th Cir. 1976); Brown v. ITT Rayonier, Inc., 497 F.2d 234, 236 (5th Cir. 1974); Burns v. Anchor-Wate Co., 469 F.2d 730, 732 (5th Cir. 1972); Barrios v. Louisiana Constr. Materials Co., 465 F.2d 1157, 1161 n.3 (5th Cir. 1972); Mach v. Pennsylvania R.R., 317 F.2d 761, 763 (3d Cir. 1963); Stanley v. Guy Scroggins Constr. Co., 297 F.2d 374, 377 (5th Cir. 1961); Zientek v. Reading Co., 220 F.2d 183, 186 n.8 (3d Cir.), *cert. denied*, 350 U.S. 846 (1955); McKie v. Diamond Marine Co., 204 F.2d 132, 135-36 (5th Cir. 1953); Kibadeaux v. Standard Dredging Co., 81 F.2d 670, 672-73 (5th Cir.), *cert. denied*, 299 U.S. 549 (1936).

264. Norton v. Warner Co., 321 U.S. 565, 566 (1944).

265. Braen v. Pfeifer Oil Transp. Co., 361 U.S. 129, 131 (1959).

266. *See, e.g.*, McDermott, Inc. v. Boudreaux, 679 F.2d 452, 455 (5th Cir. 1982); Abshire v. Seacoast Prods., Inc., 668 F.2d 832, 834 n.1 (5th Cir. 1982); Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1345 (5th Cir. 1980); Travelers Ins. Co. v. Belaire, 412 F.2d 297, 302 (1st Cir. 1969); Noble Drilling Corp. v. Smith, 412 F.2d 952, 955 (5th Cir.), *cert. denied*, 396 U.S. 906 (1969); Boatel, Inc. v. Delamore, 379 F.2d 850, 859 (5th Cir. 1967); Bodden v. Coordinated Caribbean Transp., Inc., 369 F.2d 273, 274 (5th Cir. 1966).

267. Davis v. Hill Eng'g, Inc., 549 F.2d 314, 326 (5th Cir. 1977); Holland v. Allied Structural Steel Co., 539 F.2d 476, 479 (5th Cir. 1976), *cert. denied*, 429 U.S. 1105 (1977); *cf.* Noble Drilling Corp. v. Smith, 412 F.2d at 955.

268. *See, e.g.*, Mahramas v. American Export Isbrandtsen Lines, 475 F.2d 165, 170 (2d

the class of workers covered under the Jones Act has characterized the development of criteria by which seaman status is judged.

The initial battleground used to establish the tests for seaman status involved the land-based laborers who work on or around vessels in the harbor. Congress intended these workers to be treated like their counterparts who do not have the advantage of maritime remedies.[269] The difference between these workers and "seamen" was explained in *C. Flanagan & Sons, Inc. v. Carken*:[270]

> A stevedore or longshoreman has no contract with the ship. He has not bound himself to its service. He does not serve as a member of its crew, but performs for an independent contractor a duty that formerly was ordinarily done by the crew, not upon the high sea, but at the ship's destination, minus the perils of the voyage. He does not undergo the hardships and dangers, nor does he surrender the personal rights and liberties that a seaman does in binding himself to the vessel as a member of its crew in exchange for the right of maintenance, care, and wages flowing to the seaman by virtue of his contract to serve the ship.[271]

Some of the early cases attempted to define the class of workers remaining under the Jones Act after the LHWCA with such expressions as "seafaring men"[272] and "the whole company belonging to a vessel or a boat."[273] Other courts looked to circumstances surrounding the worker's employment, such as living ashore[274] and being paid by the hour.[275] The tests which are in use today originated in the Nineteenth Century cases which adopted several standards but achieved no uniformity.[276] In *Seneca Washed Gravel Corp. v. McManigal*,[277] a watchman fell overboard from the steamer VIKING and drowned. After noting Justice Story's definition of "crew" as the "ship's company,"[278] the Second Circuit adopted an "aid in navigation" test: "The crew is usually referred to and is naturally and primarily thought of as those who are on board and aiding in the navigation without reference to the nature of the arrangement under which they

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Cir. 1973); Hardaway Contracting Co. v. O'Keeffe, 414 F.2d 657, 659-60 (5th Cir. 1968); *cf.* Brown & Root, Inc. v. DeSautell, 554 S.W.2d 764, 766 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

269. *See supra* notes 88-94, 104-14 and accompanying text.

270. 11 S.W.2d 392 (Tex. Civ. App.—Beaumont 1928, no writ).

271. *Id.* at 394.

272. Moore Dry Dock Co. v. Pillsbury, 100 F.2d 245, 246 (9th Cir. 1938).

273. Hunt v. United States, 17 F. Supp. 578, 583 (S.D.N.Y. 1936), *aff'd*, 91 F.2d 1014 (2d Cir.), *cert. denied*, 302 U.S. 792 (1937).

274. *See, e.g.*, DeWald v. Baltimore & O. R.R., 71 F.2d 810, 811 (4th Cir.), *cert. denied*, 293 U.S. 581 (1934). Occupying quarters on the ship did not give seaman status to a night watchman in Union Oil Co. v. Pillsbury, 63 F.2d 925, 926 (9th Cir. 1933).

275. Lawson v. Maryland Casualty Co., 94 F.2d 193, 194 (5th Cir. 1938).

276. *See supra* text accompanying notes 5-38.

277. 65 F.2d 779 (2d Cir. 1933).

278. *Id.* at 780 (quoting United States v. Winn, 28 F. Cas. 733, 737 (D. Mass. 1838)(No. 16,740)).

are on board."[279] While the watchman "attended the fires, . . . he did nothing that assisted in any way the navigation of the ship."[280] Thus, he was not a member of the crew.[281]

While several courts followed the aid in navigation test from *Seneca*,[282] other tests were being incorporated into the definition of seaman/crewmember. In attempting to apply the aid in navigation standard, the Seventh Circuit in *A.L. Mechling Barge Line v. Bassett*[283] had no doubt that a cook on a towboat was "necessary to the carrying on of the navigation in which the boat is engaged."[284] In distinguishing between longshoremen and members of the crew, however, the court noted the "fundamental distinction, generally recognized, has been whether the employee was permanently attached to a ship engaged in navigation."[285] In *Gonzales v. United States Shipping Board, Emergency Fleet Corp.*,[286] the Eastern District of New York dealt with a worker injured on one "vessel" in a "laid-up fleet" of dead ships.[287] Requiring that the ship be "in navigation,"[288] the court denied seaman status to the worker[289] because the ship was like "an island composed of wood and rusted iron on which these men work, so far as any real navigation goes."[290]

In 1941, the First Circuit in *Carumbo v. Cape Cod S.S. Co.*[291] was the first court to consider all of the criteria being used in Jones Act cases. The court pointed out that the worker must be both a seaman and a member of a crew in order to maintain an action under the Jones Act.[292] The court noted that "the word 'seaman' . . . does not mean the same

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279. *Seneca*, 65 F.2d at 780 (citing The BOUND BROOK, 146 F. 160, 164 (D. Mass. 1906); The BUENA VENTURA, 243 F. 797, 799 (S.D.N.Y. 1916)).

280. *Seneca*, 65 F.2d at 780.

281. *Id.*

282. *See, e.g.*, Taylor v. McManigal, 89 F.2d 583, 585 (6th Cir. 1937); DeWald v. Baltimore & O. R.R., 71 F.2d at 811, 813; Harper v. Parker, 9 F. Supp. 744, 745 (D. Md. 1935).

283. 119 F.2d 995 (7th Cir. 1941).

284. *Id.* at 998.

285. *Id.*; see also Maryland Casualty Co. v. Lawson, 94 F.2d 190, 192 (5th Cir. 1938) in which the Fifth Circuit stated: "There is implied a definite and permanent connection with the vessel . . . ." Although not an articled seaman, the worker was considered a member of the crew because "he was permanently attached to the dredge and her attendant scow as a member of the ship's company." *Id.* at 193.

286. 3 F.2d 168 (E.D.N.Y. 1924).

287. *Id.* at 169.

288. *Id.* at 170. *See also* Frankel v. Bethlehem-Fairfield Shipyard, Inc., 132 F.2d 634, 635-36 (4th Cir. 1942), *cert. denied*, 319 U.S. 746 (1943); Hawn v. American S.S. Co., 107 F.2d 999, 1000-01 (2d Cir. 1939); Hayford v. Doussony, 32 F.2d 605 (5th Cir. 1929); City of Los Angeles v. United Dredging Co., 14 F.2d 364, 365-66 (9th Cir. 1926).

289. *Gonzales*, 3 F.2d at 172.

290. *Id.* at 169. The court cited, *inter alia*, Saylor v. Taylor, 77 F. 476 (4th Cir. 1896); The SIRIUS, 65 F. 226, 229 (N.D. Cal. 1895); The JOSHUA LEVINESS, 13 F. Cas. 1155 (E.D.N.Y. 1878)(No. 7,549). *See supra* note 5.

291. 123 F.2d 991 (1st Cir. 1941).

292. *Id.* at 994.

thing as 'member of a crew.' "[293] The class of seaman is broad enough to encompass members of a crew and land-based workers such as longshoremen, but its members need not be on board "primarily to aid in navigation" in order to qualify.[294] "[W]e feel constrained to hold that one who does any sort of work aboard a ship in navigation is a 'seaman' within the meaning of the Jones Act."[295] As to the restriction in the LHWCA that the worker be a member of a crew of a vessel, the court adopted the three tests which had been used separately by the courts: "The requirements that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation appear to us to be the essential and decisive elements of the definition of a 'member of a crew'."[296]

After *Carumbo* the circuit courts followed suit and adopted[297] the three elements[298] collected in that decision. The unanimity on the elements, however, did not mean that there was consistent application. The Supreme Court set the tone for the disarray in the lower courts in *Norton v. Warner Co.*[299] The Court confused the terms "seaman" and "crew" and reverted to the standards for determining seaman status which existed prior to the passage of the LHWCA.[300] Although the Court purported to follow its requirement that the crew "embraced those 'who are naturally and primarily on board' the vessel 'to aid in her navigation,' "[301] the class was expanded to include those who "contribute to and labor about the operation and welfare of the ship when she is upon a voyage."[302]

Some circuit courts preceded the Supreme Court in expanding the aid in navigation requirement,[303] but the decision in *Norton* led the way

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293. *Id.*

294. *Id.* The court did require a ship in navigation in order for the worker to qualify as a seaman. *Id.*

295. *Id.* at 995.

296. *Id.*

297. *See, e.g.*, Harney v. William M. Moore Bldg. Corp., 359 F.2d 649, 654 (2d Cir. 1966); Zientek v. Reading Co., 220 F.2d at 185; McKie v. Diamond Marine Co., 204 F.2d at 136; Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383, 388 (6th Cir.), *cert. denied*, 346 U.S. 817 (1953); Puget Sound Freight Lines v. Marshall, 125 F.2d 876, 879 (9th Cir. 1942). The district courts fell in line also. *See, e.g.*, Rackus v. Moore-McCormack Lines, 85 F. Supp. 185, 187 (E.D. Pa. 1949).

298. Some courts considered the elements on a sliding scale such that "[a] less permanent connection with the ship might require a more significant navigational function." Harney v. William M. Moore Bldg. Corp., 359 F.2d at 654.

299. 321 U.S. 565 (1944).

300. *See supra* text accompanying notes 132-38.

301. *Norton*, 321 U.S. at 572 (quoting South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 260 (1940)).

302. *Norton*, 321 U.S. at 572 (quoting The BUENA VENTURA, 243 F. at 799).

303. *See, e.g.*, Schantz v. American Dredging Co., 138 F.2d 534, 537 (3d Cir. 1943); A.L. Mechling Barge Line v. Bassett, 119 F.2d at 998; Osland v. Star Fish & Oyster Co., 107 F.2d 113, 114 (5th Cir. 1939).

for the emasculation of the test.[304] As the Supreme Court continued to expand the coverage of the Jones Act,[305] the three-part test from *Carumbo* was stretched to the breaking point. Rather than continuing to liberalize the *Carumbo* test, some courts abandoned it altogether. Thus in *Perez v. Marine Transport Lines*,[306] Judge Skelly Wright of the Eastern District of Louisiana concluded that the "real test" was not whether the worker assisted in the navigation of the vessel but "whether the claimant is more or less permanently employed aboard the vessel in a capacity which contributes to the accomplishment of her mission."[307] Judge Wright also rejected the requirement that "the vessel in question must be in navigation"[308] and held that there could be Jones Act coverage "[a]s long as a vessel is buoyant and capable of being floated from one location to another to accomplish her mission . . . ."[309]

The major departure from *Carumbo* came in answer to the riddle: "When is a roughneck a seaman?"[310] In *Offshore Co. v. Robison*[311] a roughneck was assisting in running casing on a drilling rig. The rig was mounted on a platform or barge and had eight legs resting firmly on the bottom of the Gulf of Mexico approximately three miles from the Texas coast. The barge had no engines and was towed between drilling locations in the Gulf. Robison's contribution to the casing operation was to crease the threaded ends of the casing and to hook an air hoist line to the casing. An unsecured section of casing rolled toward Robison, and he suffered a fractured leg attempting to escape.[312]

Robison brought suit against his employer alleging he was a seaman and member of the crew of the drilling barge OFFSHORE NO. 55 which was owned by his employer. A jury found the OFFSHORE NO. 55 was a vessel and Robison was a member of its crew.[313] The Fifth Circuit, which had previously adopted the *Carumbo* test,[314] reviewed the decisions of the Supreme Court which expanded seaman status and stated that the aid in navigation test had been "watered down until the words have lost their natural meaning."[315] Noting that "cases piled on cases" had permitted recovery "when by no stretch of the imagination can it be said that the

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304. *See, e.g.*, Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d at 388; Jeffrey v. Henderson Bros., Inc., 193 F.2d 589, 592-93 (4th Cir. 1951); Daffin v. Pape, 170 F.2d 622, 625 (5th Cir. 1948).

305. *See supra* text accompanying notes 145-89.

306. 160 F. Supp. 853 (E.D. La. 1958).

307. *Id.* at 855.

308. *Id.*

309. *Id.* at 856.

310. Offshore Co. v. Robison, 266 F.2d 769, 771 (5th Cir. 1959).

311. *Id.*

312. *Id.* at 771-72.

313. *Id.* at 773 n.4.

314. McKie v. Diamond Marine Co., 204 F.2d at 136.

315. *Robison*, 269 F.2d at 780.

claimant had anything to do with navigation,"[316] the court concluded that a worker is a member of the ship's company "only in the sense that his duties have a connection with the mission or the function of the floatable structure where he was injured."[317] Ignoring the repeated interventions of Congress seeking to restrict the class of maritime workers covered under the Jones Act, the court stated that the law could develop naturally because of the "absence of any legislative restriction."[318] Thus, the Fifth Circuit promulgated its position on seaman status:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.[319]

Without guidance from the Supreme Court, most[320] of the circuit courts have continued to apply the three-part *Carumbo* test in determining seaman status.[321] Although the Fifth Circuit has generally followed its *Robison* test,[322] that court has occasionally reverted to the *Carumbo*

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316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.* at 779 (footnote omitted).
320. For decisions following the *Carumbo* test, see, *e.g.*, Estate of Wenzel v. Seaward Marine Servs., Inc., 709 F.2d 1326, 1327 (9th Cir. 1983); Luckett v. Continental Eng'g Co., 649 F.2d 441, 443 (6th Cir. 1981); Whittington v. Sewer Constr. Co., 541 F.2d at 436; Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 36 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); Salgado v. M.J. Rudolph Corp., 514 F.2d 750, 755 (2d Cir. 1975); Klarman v. Santini, 503 F.2d 29, 33 (2d Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); Bullis v. Twentieth Century-Fox Film Corp., 474 F.2d 392, 393 (9th Cir. 1973); Harney v. William M. Moore Bldg. Corp., 359 F.2d at 654; Nelson v. Greene Line Steamers, 255 F.2d 31, 33-34 (6th Cir.), *cert. denied*, 358 U.S. 867 (1958); Lynn v. Heyl & Patterson, Inc., 483 F. Supp. 1247, 1250 (W.D. Pa.), *aff'd*, 636 F.2d 1209 (3d Cir. 1980); Garcia v. Universal Seafoods, Ltd., 459 F. Supp. 463, 464 (W.D. Wash. 1978); Chapman v. M/G Transp. Servs., Inc., 432 F. Supp. 723, 725 (W.D. Pa. 1977); Specht v. Pittsburgh Coal Co., 432 F. Supp. 717, 719 (W.D. Pa. 1975).
321. For decisions outside the Fifth Circuit which have followed the *Robison* test, see, *e.g.*, Bennett v. Perini Corp., 510 F.2d 114, 115 (1st Cir. 1975); Slatton v. Martin K. Eby Constr. Co., 506 F.2d 505, 510 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975); Stafford v. Perini Corp., 475 F.2d 507, 510 (1st Cir. 1973).
322. *See, e.g.*, Parks v. Dowell Div. of Dow Chem. Corp., 712 F.2d 154, 158 (5th Cir. 1983); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349, 1352 (5th Cir. 1983); Dove v. Belcher Oil Co., 686 F.2d 329, 333 n.6 (5th Cir. 1982); Burks v. American River Transp. Co., 679 F.2d 69, 75-76 (5th Cir. 1982); Abshire v. Seacoast Prods., Inc., 668 F.2d at 835; Roberts v. Williams-McWilliams Co., 648 F.2d 255, 260-61 n.9 (5th Cir. 1981); Crador v. Louisiana Dept. of Highways, 625 F.2d 1227, 1229 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); Billings v. Chevron, U.S.A., Inc., 618 F.2d 1108, 1109 (5th Cir. 1980); Stokes v. B.T. Oilfield Servs., 617 F.2d 1205, 1206 (5th Cir. 1980); Longmire v. Sea Drilling Corp., 610 F.2d at 1345;

test.[321] Attempting to explain its use of both tests, the Fifth Circuit initially stated that *Robison* was "an elaboration and refinement"[324] of the three-part test announced by that court in *McKie v. Diamond Marine Co.*[325] When the Fifth Circuit continued to use the three-part test, however, one panel stated that the *Robison* test had been "refined"[326] by a subsequent decision which followed *McKie*.[327] More recently, in *McDermott, Inc. v. Boudreaux*[328] and *Bertrand v. International Mooring & Marine, Inc.*,[329] the Fifth Circuit attempted to explain the relationship between the tests[330] being used for seaman status, but the explanations only exacerbated the confusion.[331]

Beard v. Shell Oil Co., 606 F.2d 515, 517 (5th Cir. 1979); Bazile v. Bisso Marine Corp., 606 F.2d 101, 104 (5th Cir. 1979), *cert. denied*, 449 U.S. 829 (1980); Kirk v. Land & Marine Applicators, Inc., 555 F.2d 481, 482 (5th Cir. 1977); Davis v. Hill Eng'g, Inc., 549 F.2d at 326; Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 432 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978); Holland v. Allied Structural Steel Co., 539 F.2d at 484; Owens v. Diamond M Drilling Co., 487 F.2d 74, 76 (5th Cir. 1973); Dugas v. Pelican Constr. Co., 481 F.2d 773, 777 n.5 (5th Cir.), *cert. denied*, 414 U.S. 1093 (1973); Ross v. Mobil Oil Corp., 474 F.2d 989, 990-91 (5th Cir.), *cert. denied*, 414 U.S. 1012 (1973); Burns v. Anchor-Wate Co., 469 F.2d at 732 n.2; Keener v. Transworld Drilling Co., 468 F.2d 729, 730 (5th Cir. 1972); Nolan v. Coating Specialists, Inc., 422 F.2d 377, 379 (5th Cir. 1970); Kimble v. Noble Drilling Corp., 416 F.2d 847, 849 (5th Cir. 1969), *cert. denied*, 397 U.S. 918 (1970); Noble Drilling Corp. v. Smith, 412 F.2d at 956; Boatel, Inc. v. Delamore, 379 F.2d at 858; Magnolia Towing Co. v. Pace, 378 F.2d 12, 13 (5th Cir. 1967); Producers Drilling Co. v. Gray, 361 F.2d 432, 434 (5th Cir. 1966); Rotolo v. Halliburton Co., 317 F.2d 9, 12 (5th Cir.), *cert. denied*, 375 U.S. 852 (1963); Stanley v. Guy Scroggins Constr. Co., 297 F.2d at 377; Braniff v. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523, 526 (5th Cir. 1960).

323. *See, e.g.*, Wixom v. Boland Marine & Mfg. Co., 614 F.2d 956, 957 (5th Cir. 1980); Garcia v. Queen, Ltd., 487 F.2d 625, 628 n.6 (5th Cir. 1973); Cox v. Otis Eng'g Corp., 474 F.2d 613 (5th Cir. 1973); Williams v. Avondale Shipyards, Inc., 452 F.2d 955, 958 (5th Cir. 1971); Bodden v. Coordinated Caribbean Transp., Inc., 369 F.2d at 274.

324. Brown v. ITT Rayonier, Inc., 497 F.2d at 237 n.2.

325. 204 F.2d at 136.

326. Guidry v. Continental Oil Co., 640 F.2d 523, 528 (5th Cir.), *cert. denied*, 454 U.S. 818 (1981).

327. The subsequent decision is Bodden v. Coordinated Caribbean Transp., Inc., 369 F.2d at 274.

328. 679 F.2d 452 (5th Cir. 1982).

329. 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3533 (U.S. Jan. 16, 1984).

330. The Fifth Circuit occasionally uses a third test which is simply a restatement of *Robison* in three parts:

> (1) [H]e must have a more or less permanent connection with (2) a vessel in navigation and (3) the capacity in which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance during its movement or during anchorage for its future trips.

See, e.g., Barrios v. Engine & Gas Compressor Servs., 669 F.2d 350, 352 (5th Cir. 1982); Watkins v. Pentzien, Inc., 660 F.2d 604, 606 (5th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982); Guidry v. South La. Contractors, Inc., 614 F.2d at 452; *see also* Barrios v. Louisiana Constr. Materials Co., 465 F.2d at 1161.

331. The Fifth Circuit cited both *Robison* and *McKie* in Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 280-81 (5th Cir. 1981) and called it the "*McKie/Robison* analysis." *Id.* at

In *McDermott*, the Fifth Circuit noted that most maritime courts use the three-part test in some form.[332] Although admitting that the Fifth Circuit never abandoned *McKie*, the court considered *Robison* "as an essential commentary upon that standard in this Circuit."[333] The court stated that *Robison* was introduced as a "threshold test" for determining if the worker presented sufficient evidence to avoid summary judgment on seaman status.[334] The Fifth Circuit's subsequent decisions, however, expanded *Robison* so that it was used also "in delimiting the power of the factfinder to deny or confer such status."[335] "Effectively, '*Offshore Co. v. Robison* . . . established in the Fifth Circuit the test for seaman status under the Jones Act.' "[336]

Less than a year after *McDermott*, the Fifth Circuit in *Bertrand* stated that "the *McKie* test 'still articulates the basic compass of the term 'seaman' as used in the Jones Act.' "[337] As in *McDermott*, however, the court indicated that the *Robison* test should be used in weighing the evidence for summary judgment and the role of the factfinder in determining seaman status.[338] But the court pointed out that "we never abandoned the *McKie* test, but continue to quote it or a modified version, which encompasses the second part of the *Robison* test, primarily to address cases in which the issue is whether the vessel is in navigation."[339] Because the issue involved in *Bertrand* was the worker's permanent connection to the vessel,[340] the court analyzed the case under the *Robison* test.[341]

The inconsistent statements from the Fifth Circuit leave the test for seaman status cloudy in that circuit. Is a Jones Act case submitted to the jury under the "basic compass" of *McKie*[342] or under *Robison*'s test "delimiting the power of the factfinder to deny or confer such status?"[343] If the Fifth Circuit has abandoned the *McKie* test in favor of the *Robison*

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281. The Sixth Circuit has stated that the tests are "virtually the same." Searcy v. E.T. Slider, Inc., 679 F.2d 614, 616 (6th Cir. 1982).

332. *McDermott*, 679 F.2d at 455. It is interesting to note that the Fifth Circuit in *McDermott* considered the three-part test to have been fashioned in Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d at 388, despite its formulation twelve years earlier in *Carumbo*. *See supra* text accompanying notes 291-96.

333. *McDermott*, 679 F.2d at 457.

334. *Id.*

335. *Id.*

336. *Id.* (quoting Abshire v. Seacoast Prods., Inc., 668 F.2d at 835). The court also considered *Robison* to state the test for crewmember status under the restriction contained in the LHWCA. *McDermott*, 679 F.2d at 457.

337. *Bertrand*, 700 F.2d at 244 (quoting *Ardoin*, 641 F.2d at 280).

338. *Bertrand*, 700 F.2d at 244 (citing *McDermott*, 679 F.2d at 457).

339. *Bertrand*, 700 F.2d at 244 n.9.

340. *Id.* at 243.

341. *Id.* at 244.

342. *Id.* (quoting *Ardoin*, 641 F.2d at 280).

343. *Bertrand*, 700 F.2d at 244 (quoting *McDermott*, 679 F.2d at 457).

standards, does *McKie* still have some validity regarding the question of whether there is a vessel in navigation? Clarification from the Fifth Circuit is necessary, but not in the same fashion as *McDermott* and *Bertrand*.[344]

VII. FURTHER MODIFICATIONS

The elements of the *Carumbo* three-part test are (1) a vessel in navigation; (2) a more or less permanent connection with the vessel; and (3) that the worker be aboard primarily to aid in navigation. The *Robison* test modifies each of the three parts in some fashion. The vessel in navigation was enlarged with "special purpose structures not usually employed as a means of transport by water but designed to float on water."[345] The permanent connection, which is the heart of a worker's status as a crewmember, was emasculated by permitting the claimant to perform "a substantial part of his work on the vessel."[346] Finally, the aid in navigation element was scrapped in favor of requiring the worker's duties contribute to "the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance . . . ."[347] These changes were made in order that all those subject to "the same marine risks"[348] would have seamen's remedies, including those workers on "strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico."[349] In light of the complex structures and relationships offshore,[350] the *Robison* test has undergone substantial refinement.[351]

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344. A recent decision from the Fifth Circuit, Bouvier v. Krenz, 702 F.2d 89 (5th Cir. 1983), has not clarified the situation: "There are three different formulations in this circuit of the test for seaman status, but they are all essentially equivalent." *Id.* at 90.

345. *Robison*, 266 F.2d at 779.

346. *Id.*

347. *Id.*

348. *Id.* at 780.

349. *Id.*

350. *See* American Petroleum Inst. v. E.P.A., 661 F.2d 340, 343 (5th Cir. 1981):

> Just as one finds a variety of architectural styles in the average suburb, so one finds different types of oil rigs in the offshore neighborhood. Mobile rigs drill from floating barges or hulls. Especially in coastal areas, oil companies drill wells from barges, with production facilities established adjacent to the well on platforms or artificial islands. Yet others are floated into place and then raised on telescoping legs. Stationary rigs, by contrast, sit astride steel platforms resting on the seabed which do justice to Rube Goldberg.

351. Despite the Supreme Court's admonitions in connection with the necessity of submitting Jones Act cases to the fact finder, the Fifth Circuit has declared that some workers on special purpose vessels are so clearly seamen that the trial court should grant an instructed verdict that the claimant is a seaman under the Robison test. *See, e.g.*, Coulter v. Texaco, Inc., 714 F.2d 467, 468 (5th Cir. 1983); Jenkins v. Aquatic Contractors & Eng'rs, 446 F.2d 520, 521 (5th Cir. 1971); Magnolia Towing Co. v. Pace, 378 F.2d 12, 13 (5th Cir. 1967); Marine Drilling Co. v. Autin, 363 F.2d 579, 582 (5th Cir. 1966); Producers Drilling Co. v. Gray, 361 F.2d 432, 437 (5th Cir. 1966).

a. Special Purpose Structures/Vessels

On the issue of what vessels can provide the setting for Jones Act status, *Robison* simply provides that "a vessel may mean something more than a means of transport on water."[352] Thus an undefined class of "special purpose structures . . . designed to float on water" was added to the test.[353] But *Robison* arrived long after Congress and the Supreme Court had provided standards defining the term vessel. The definition of vessel promulgated by Congress includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.[354] The Supreme Court succinctly summarized the criteria used in determining whether there is a vessel in navigation in *The ROBERT W. PARSONS*: "In fact, neither size, form, equipment nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged."[355] The Court has also pointed out that because "it floats on the water does not make it a ship or a vessel."[356]

While the search for oil and gas offshore has generated litigation on the subject of special purpose structures,[357] the harbors and inland waters

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352. *Robison*, 266 F.2d at 776. Once a worker attains seaman status to a vessel, it is not necessary that the accident occur on the vessel or that his tasks relate to the service of that vessel. Braen v. Pfeifer Oil Transp. Co., 361 U.S. 129, 132-33 (1959); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 42-43 (1943). Thus, an injured deckhand who was only able to perform light duty work was held a Jones Act seaman while cleaning duck blinds on land leased to his employer. Savoie v. Otto Candies, Inc., 692 F.2d 363, 365-66 (5th Cir. 1982).

353. *Robison*, 266 F.2d at 779.

1 U.S.C. § 3 (1976); *see also* 46 U.S.C. § 713 (1976): "[T]he term vessel shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river . . . ."

355. 191 U.S. 17, 30 (1903).

356. Cope v. Vallette Dry Dock Co., 119 U.S. 625, 627 (1887); *see also* Blanchard v. Engine & Gas Compressor Servs., 575 F.2d 1140, 1143 (5th Cir. 1978); Powers v. Bethlehem Steel Corp., 477 F.2d 643, 647 n.4 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973); Cook v. Belden Concrete Prods., Inc., 472 F.2d 999, 1001 (5th Cir.), *cert. denied*, 414 U.S. 868 (1973); Atkins v. Greenville Shipbuilding Corp., 411 F.2d 279, 283 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969).

357. For examples of special purpose structures or craft considered vessels, see Lambert v. Diamond M Drilling Co., 683 F.2d 935, 936 (5th Cir. 1982)(semi-submersible drilling barge); McDermott, Inc. v. Boudreaux, 679 F.2d 452, 455-56 (5th Cir. 1982)(pipelaying barge); Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 281 (5th Cir. 1981)(derrick barge); Spinks v. Chevron Oil Co., 507 F.2d 216, 220 (5th Cir. 1975)(jack-up drilling barge); Kimble v. Noble Drilling Corp., 416 F.2d 847, 850 (5th Cir. 1969)(tender), *cert. denied*, 397 U.S. 918 (1970); Producers Drilling Co. v. Gray, 361 F.2d 432, 436-37 (5th Cir. 1966)(submersible drilling barge). For examples of structures or craft not considered vessels, see Barrios v. Engine & Gas Compressor Servs., Inc., 669 F.2d 350, 353 (5th Cir. 1982)(compressor station); Smith v. Falcon Seaboard, Inc., 463 F.2d 206, 207-08 (5th Cir.)(fixed platform), *cert. denied*, 409 U.S. 1085 (1972); Percle v. Western Geophysical Co., 528 F. Supp. 227, 229-30 (E.D. La. 1981)(marsh buggy).

have provided the setting for much of the development of the standards for determining what is a vessel in navigation.[358] The Supreme Court had the opportunity to apply its criteria for vessel status in *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*[359] A wharf boat was secured to the shore by four or five cables and had no machinery or means of propulsion. The vessel had connections to the shore for water, electricity and telephones. Cargo was stowed on the vessel, and the vessel was also used to transfer goods to and from other ships.[360] The vessel did not, however, transport goods between locations, serving instead as a warehouse.[361] In denying vessel status the Court concluded: "It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land."[362] Finally, the Court considered it important that the wharf boat "did not encounter perils of navigation to which craft used for transportation are exposed."[363]

The cases involving special purpose craft in the harbor have often[364] reached results similar to *Evansville*.[365] In *Powers v. Bethlehem Steel*

358. *See, e.g.*, Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19 (1926); New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96 (1922); The ROBERT W. PARSONS, 191 U.S. 17; Cope v. Vallette Dry Dock Co., 119 U.S. 625.

359. 271 U.S. 19. The issue of vessel status arose when the owner sought to limit liability under the Limitation of Liability Act, 46 U.S.C. §§ 181-89 (1976).

360. *Evansville*, 271 U.S. at 19-21.

361. *Id.* at 22.

362. *Id.*

363. *Id.*

364. *But see, e.g.*, Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 373-74 (1957)(dredge); Brunet v. Boh Bros. Constr. Co., 715 F.2d 196, 197-99 (5th Cir. 1983) (pile-driving crane barge); Estate of Wenzel v. Seaward Marine Servs., Inc., 709 F.2d 1326, 1327-28 (9th Cir. 1983)(six-foot submerged cleaning and maintenance platform used in cleaning the hulls of vessels); Verrett v. McDonough Marine Serv., 705 F.2d 1437, 1441 (5th Cir. 1983)(small speedboat); Burks v. American River Transp. Co., 679 F.2d 69, 75 (5th Cir. 1982)(crane barge); Baker v. Raymond Int'l, Inc., 656 F.2d 173, 181-84 (5th Cir. 1981)(pile-driving barge), *cert. denied*, 456 U.S. 983 (1982); Luckett v. Continental Eng'g Co., 649 F.2d 441, 443 (6th Cir. 1981)(16-foot motor boat); Salgado v. M.J. Rudolph Corp., 514 F.2d 750, 755-56 (2d Cir. 1975)(floating crane); Bennett v. Perini Corp., 510 F.2d 114, 116 (1st Cir. 1975)(crane barge); Slatton v. Martin K. Eby Constr. Co., 506 F.2d 505, 510 (8th Cir. 1974)(work barge), *cert. denied*, 421 U.S. 931 (1975); Hartley v. Peter Kiewit Sons' Co., 543 F. Supp. 401, 404-05 (E.D.N.Y. 1982)(derrick barge and scow); Wendt v. General Dynamics Corp., 1979 A.M.C. 2897, 2900-03 (D.N.J. 1978)(navigation buoy). *Cf.* McCarthy v. The Bark PEKING, 716 F.2d 130, 133-36 (2d Cir. 1983)(museum vessel on exhibit as an artifact), *petition for cert. filed*, 52 U.S.L.W. 3462 (U.S. Nov. 21, 1983) (No. 83-851).

365. *See, e.g.*, Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349, 1353-54 (5th Cir. 1983)(submarine pipe alignment rig); Watkins v. Pentzien, Inc., 660 F.2d 604, 606-08 (5th Cir. 1981)(construction platform), *cert. denied*, 456 U.S. 944 (1982); Smith v. Massman Constr. Co., 607 F.2d 87, 89 (5th Cir. 1979)(caisson); Provost v. Huber, 594 F.2d 717, 719 (8th Cir. 1979)(truck-trailer transporting house across frozen lake); Leonard v. Exxon Corp., 581 F.2d 522, 524 (5th Cir. 1978)(floating construction platform), *cert. denied*, 441 U.S. 923 (1979); Shows v. Harber, 575 F.2d 1253, 1254 (8th Cir. 1978)(scaffold); Cook v. Belden Concrete Prods., Inc., 472 F.2d at 1002 (floating construction platform); Fleming v. Port Allen

Corp.,[366] the First Circuit provided an excellent summary and application of the principles involved in determining whether a harbor structure is a vessel. Powers was employed by McKie Lighter Co. as a pile driver. He was injured on a raft owned by McKie while repairing pilings supporting a Bethlehem Steel Corp. pier. The raft was about 25 feet long and 5 feet wide and was made from 12 by 12 timbers. The raft was used to clean the piles by chipping and sandblasting and to place a form around the piles into which concrete was poured. The raft was moved around the piles by poling or pulling on lines attached to the pier, and at least one line normally remained to connect the raft and pier.[367] Powers suffered his accident while preparing to move the raft about twenty feet to some piles underneath the pier.[368]

The First Circuit began its analysis with the test from *The ROBERT W. PARSONS*, "the purpose for which the craft was constructed and the business in which it is engaged."[369] In *Powers*, the purpose and business of the raft were not to transport cargo or passengers across navigable waters but rather "to provide a stable platform for men repairing defective piles."[370] The court compared the raft to permanent floating docks which have not been considered vessels by the courts.[371] Thus, any "voyages" in which the raft was "towed" between piers or in which it was poled or hauled between piles were "no different from the dragging of a section of floating dock from one location to another."[372] If the raft were to be towed for appreciable distances and be unattached to land, the court indicated the raft might temporarily acquire vessel status.[373] However, hauling the raft under a pier while it remained attached to land did not give rise to that status. Finally, the court distinguished the types of offshore vessels which were addressed in *Robison*, because their function

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Marine Serv., Inc., 552 F. Supp. 27, 28-30 (M.D. La. 1982)(floating work flat); Mayfield v. Well Shipyard, Inc., 510 F. Supp. 605, 607 (E.D. La. 1981)(steel pontoon float); Berfect v. American Commercial Barge Lines, 509 F. Supp. 734, 736 (E.D. La. 1981)(work flat or pontoon); Garcia v. Universal Seafoods, Ltd., 459 F. Supp. 463, 464-65 (W.D. Wash. 1978)(floating seafood processor).

366. 477 F.2d 643 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973).

367. *Id.* at 645.

368. *Id.* at 646.

369. *Id.* at 646-47 (quoting Cook v. Belden Concrete Prods., Inc., 472 F.2d at 1001 (quoting The ROBERT W. PARSONS, 191 U.S. at 30)).

370. *Powers*, 477 F.2d at 647.

371. *Id.*; *see, e.g.*, Cope v. Vallette Dry Dock Co., 119 U.S. at 627; Keller v. Dravo Corp., 441 F.2d 1239, 1244 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017 (1972); Chahoc v. Hunt Shipyard, 431 F.2d 576, 577 (5th Cir. 1970), *cert. denied*, 401 U.S. 982 (1971); Atkins v. Greenville Shipbuilding Corp., 411 F.2d at 282-83. *But see* United States v. Moran Towing & Transp. Co., 374 F.2d 656, 662-64 (4th Cir. 1967), *vacated sub nom.* United States v. Bethlehem Steel Co., 389 U.S. 575 (1968); J.M.L. Trading Corp. v. Marine Salvage Corp., 501 F. Supp. 323, 325-26 (E.D.N.Y. 1980).

372. *Powers*, 477 F.2d at 647.

373. *Id.* at 648; *see* United States v. Moran Towing & Transp. Co., 374 F.2d at 662-64.

"requires exposure to the hazards of the sea."[374]

One area of recent controversy in the vessel status inquiry has been whether aircraft may qualify as vessels so as to give seaman status to their "crew."[375] After the Supreme Court removed some aviation accidents from the admiralty jurisdiction,[376] the lower courts gradually restored aircraft accidents to the maritime sphere.[377] The United States District Court for the Eastern District of Texas, however, took aircraft further in *Barger v. Petroleum Helicopters, Inc.*[378] Walter Barger was the pilot of a helicopter owned by Petroleum Helicopters when it crashed in the Gulf of Mexico, killing everyone aboard.[379] The helicopter was equipped with pontoons, a life raft and other life saving apparatus and could land, take off, float and taxi on the water.[380] The court initially stated that the helicopter was "capable of being used as a means of transportation and to float on water" within the meaning of the *Robison* test.[381] But the court also looked to the test from *The ROBERT W. PARSONS* involving the purpose for which the craft is constructed and the business in which it is engaged. The helicopter was constructed to transport men and materials across portions of the Gulf of Mexico, and it was specifically designed for movement on water. Consequently, the first part of the test was satisfied.[382] The business in which the helicopter was engaged included transporting workers to and from drilling rigs in the Gulf of Mexico. The court had "no doubt" that this was traditional maritime activity because the helicopter was the "functional equivalent of a crewboat."[383] Since flotation on water by itself is not sufficient to give vessel status,[384] the court stated that "risk and exposure to the hazards of the sea must be present."[385] Noting that when a helicopter malfunctions, "the pilot and passengers stand a far greater chance of losing their lives

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374. *Powers*, 477 F.2d at 647.

375. *See generally* Symposium Article, *Aircraft as Vessels under the Jones Act and General Maritime Law*, 22 S. Tex. L.J. 595 (1981).

376. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).

377. *See, e.g.*, Ledoux v. Petroleum Helicopters, Inc., 609 F.2d 824, 824 (5th Cir. 1980); Roberts v. United States, 498 F.2d 520, 524 (9th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828, 840 (D.V.I. 1977); Hammill v. Olympic Airways, 398 F. Supp. 829, 834 (D.D.C. 1975); Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164, 1167 (W.D. La. 1973), *aff'd in part and rev'd in part*, 545 F.2d 422, 424 n.1 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978); Hark v. Antilles Airboats, Inc., 355 F. Supp. 683, 685 (D.V.I. 1973).

378. 514 F. Supp. 1199 (E.D. Tex. 1981), *rev'd*, 692 F.2d 337 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 2430 (1983).

379. *Id.* at 1202-03.

380. *Id.* at 1206.

381. *Id.* at 1207.

382. *Id.*

383. *Id.* (footnote omitted).

384. *See supra* text accompanying note 356.

385. Barger v. Petroleum Helicopters, Inc., 514 F. Supp. at 1207.

in a mishap than their counterparts aboard a traditional seagoing vessel," the court concluded that the pilot was exposed to the hazards of the sea to the same or greater extent than blue-water sailors.[386] Thus, the court held the helicopter was a vessel under the Jones Act and that Barger was a seaman.[387]

Before the appeal in *Barger* was decided by the Fifth Circuit, that court was presented with the aircraft as vessel question in *Smith v. Pan Air Corp.*[388] Curtis Jordan was the pilot of a plane being used to transport passengers to a mineral operation near the mouth of the Mississippi River which was practically inaccessible by land travel. The plane was equipped with water flotation equipment which permitted landing in a canal adjacent to the mineral operation. After delivering his passengers, Jordan took off from the canal; the plane struck a set of guy wires to an antenna tower; and Jordan was killed when the plane crashed onto Louisiana soil.[389] The Fifth Circuit acknowledged that the seaplane was "designed to float on water" as required by *Robison*,[390] but the court stated that *Robison* and its progeny were "concerned with 'special purpose structures' employed by the offshore drilling industry that are designed to 'float' and be towed across water to the drilling site despite their incapacity for *self-propulsion*."[391] In contrast to drilling vessels, the primary function of aircraft is transportation by air, not on water.[392] Noting that the "perils of the air" are different from the "dangers of the sea,"[393] the court concluded: "An airplane flying through the ozone does not appear to be a vessel within the meaning of an act addressed to the relief of seamen."[394]

Following its analysis in *Smith*, the Fifth Circuit in *Barger v. Petroleum Helicopters, Inc.*[395] reversed the district court decision granting seaman status to Barger. The court rejected the reasons given by the district court in support of vessel status:

> Neither a plane nor a helicopter undergoes a miraculous transformation from aircraft into vessel when pontoons are attached to it, and their pilots do not by this act become members of a "vessel's" crew. The helicop-

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386. *Id.* at 1207-08.
387. *Id.* at 1208.
388. 684 F.2d 1102 (5th Cir. 1982).
389. *Id.* at 1104.
390. *Id.* at 1113 (quoting *Robison*, 266 F.2d at 779).
391. *Smith*, 684 F.2d at 1113 (emphasis supplied). The court stated: "Thus we do not find *Robison*'s language, directed to another question, dispositive." *Id.*
392. *Id.*
393. *Id.*
394. *Id.* at 1114. The court also pointed out that "when Congress has legislated with seaplanes in mind, it has distinguished them from 'vessels.' " *Id.* at 1113. *But see* Barger v. Petroleum Helicopters, Inc., 692 F.2d 337, 344-45 (5th Cir. 1982)(Brown, J., dissenting), *cert. denied*, 103 S. Ct. 2430 (1983).
395. 692 F.2d at 339-41.

> ter's amphibian adaptations were designed solely to permit it to take off from and land on water and to taxi on water in order to position itself for loading and unloading with a view to travel through the air. It was an aircraft that might use the surface of the water for a time to facilitate airborne commerce. An airplane does not become an automobile because it has wheels attached and can taxi on runways. The wheels no more change aircraft into land vehicles than pontoons change aircraft into vessels.[396]

The Fifth Circuit concluded: "The Jones Act was designed to aid those who face the hazards of the sea, not the perils of the air."[397]

Judge John R. Brown dissented in *Barger*[398] and took issue with the abandonment in *Smith*[399] and *Barger* of the principles announced in *Robison*.[400] Judge Brown agreed with the district court that the amphibious characteristics of the helicopter and its functioning like a crewboat should bring the aircraft within the "virtually undefinable *Robison* definition of a special purpose craft."[401] Furthermore, Judge Brown found statutory support from the inclusion of seaplanes and nondisplacement craft within the definition of a vessel in Congress' latest overhaul of collision regulations.[402] Judge Brown would have extended "the flexible maritime law's concern for those who go down to sea" to "today's version of the ship's equivalent."[403]

Prior to *Smith*, the Fifth Circuit had not limited the *Robison* test of "special purpose structures . . . designed to float on water"[404] to drilling rigs "employed by the offshore drilling industry."[405] The restrictive language in the aircraft context of *Smith* can only bring confusion in determining whether other floating structures are vessels under the Jones Act.

b. Permanent Assignment/Substantial Work

The most radical expansion of the definition of a "member of a crew" in *Robison* is the requirement that the worker be "assigned permanently

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396. *Id.* at 339.

397. *Id.* at 340; *see also* Hebert v. Air Logistics, Inc., 720 F.2d 853, 856-57 (5th Cir. 1983) (helicopter is not itself a vessel, nor is it an appurtenance of the fleet of barges it serviced); Reeves v. Offshore Logistics, Inc., 720 F.2d 835, 836-37 (5th Cir. 1983) (helicopter is not a vessel).

398. *Id.* at 341 (Brown, J., dissenting).

399. *Id.* n.1.

400. *Id.* at 342-43, 345.

401. *Id.* at 343.

402. 33 U.S.C. § 1601(1) (Supp. V 1981) provides that the term "'vessel' means every description of watercraft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water . . . ."

403. *Barger*, 692 F.2d at 345.

404. *Robison*, 266 F.2d at 779.

405. *Smith*, 684 F.2d at 1113; *see, e.g.*, Hicks v. Ocean Drilling & Exploration Co., 512 F.2d 817, 823-24 (5th Cir. 1975)(oil storage facility), *cert. denied*, 423 U.S. 1050 (1976).

to a vessel" or perform "a substantial part of his work on the vessel."[406] By using the phrase "member of a crew" in the LHWCA, Congress intended to exclude seamen from the Jones Act who performed work on a vessel but did not have the permanent assignment to it.[407] Within a year, the Fifth Circuit began modifying the permanent assignment/substantial work element, "[r]ecognizing that the test set forth in *Robison* was 'an analytical starting point [rather] than a self-executing formula . . . .' "[408]

The permanent assignment/substantial work prong of the *Robison* test "offers alternative grounds for meeting the standard."[409] It is obvious that there is an element of permanence which must be met in order to satisfy the assignment part of the test,[410] but this criterion has not been given a "wooden application."[411] The Fifth Circuit has not required the worker to sign seaman's articles[412] or to eat and sleep on the vessel to which he claims a permanent assignment.[413] Judge Rubin explained the purpose of this element:

> The requirement of a relatively permanent tie to the vessel is meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for only a relatively short period of time.[414]

The Fifth Circuit has developed the following standard for judging permanence: that the relation between the worker and vessel must be substantial in point of time and work and that it not be spasmodic or sporadic.[415] The connection must be found in the employee's primary or

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406. *Robison*, 266 F.2d at 779.

407. *See supra* notes 88-94, 104-14 and accompanying text.

408. Holland v. Allied Structural Steel Co., 539 F.2d 476, 484 (5th Cir. 1976) (quoting Brown v. ITT Rayonier, Inc., 497 F.2d 234, 237 (5th Cir. 1974), *cert. denied*, 429 U.S. 1105 (1977)); *see also* Roberts v. Williams-McWilliams Co., 648 F.2d 255, 261 (5th Cir. 1981); Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 281 (5th Cir. 1981).

409. Davis v. Hill Eng'g, Inc., 549 F.2d 314, 326 (5th Cir. 1977); *see also* Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 246 (5th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3533 (U.S. Jan. 16, 1984).

410. Fazio v. Lykes Bros. S.S. Co., 567 F.2d 301, 303 (5th Cir. 1978); Rotolo v. Halliburton Co., 317 F.2d 9, 13 (5th Cir.), *cert. denied*, 375 U.S. 852 (1963).

411. Brown v. ITT Rayonier, Inc., 497 F.2d at 237; *see also* Guidry v. Continental Oil Co., 640 F.2d 523, 529 (5th Cir.), *cert. denied*, 454 U.S. 818 (1981); Davis v. Hill Eng'g, Inc., 549 F.2d at 327.

412. *See, e.g.*, Noble Drilling Corp. v. Smith, 412 F.2d 952, 957 (5th Cir.), *cert. denied*, 396 U.S. 906 (1969).

413. *See, e.g.*, Producers Drilling Co. v. Gray, 361 F.2d 432, 433 (5th Cir. 1966). Eating and sleeping on the vessel do not, however, create a connection with the vessel sufficient to give seaman status. *See, e.g.*, Owens v. Diamond M Drilling Co., 487 F.2d 74, 75, 76 (5th Cir. 1973); Keener v. Transworld Drilling Co., 468 F.2d 729, 731 (5th Cir. 1972); Ross v. Delta Drilling Co., 213 F. Supp. 270, 272 (E.D. La. 1962), *cert. denied*, 382 U.S. 966 (1965).

414. Porche v. Gulf Miss. Marine Corp., 390 F. Supp. 624, 631 (E.D. La. 1975).

415. Braniff v. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523, 528 (5th Cir. 1960); *see also* Bertrand v. International Mooring & Marine, Inc., 700 F.2d at 246; Dove v. Belcher Oil

principal duties,[416] and his incidental or transitory contacts with a vessel will not suffice.[417] Although the Fifth Circuit has stated that the nature of the work, not its duration, is the basis of the permanent relationship,[418] the court has frequently looked to the length of employment on the vessel as a controlling factor. The Fifth Circuit has been inclined to deny seaman status to workers who perform a single task, even when directly related to the mission of the vessel,[419] but when the duration of employment and mission of the vessel are "co-extensive,"[420] the worker has been held to be a seaman.[421]

The *Robison* standards have been put to the test in the context of fixed offshore platforms which are serviced by support vessels such as tenders.[422] Two decisions rendered on the same day by Judge Putnam of

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Co., 686 F.2d 329, 333 (5th Cir. 1982); Barrios v. Engine & Gas Compressor Servs., 669 F.2d 350, 353 (5th Cir. 1982); Roberts v. Williams-McWilliams Co., 648 F.2d at 261; Guidry v. Continental Oil Co., 640 F.2d at 529; Rotolo v. Halliburton Co., 317 F.2d at 13.

416. Billings v. Chevron, U.S.A., Inc., 618 F.2d 1108, 1110 (5th Cir. 1980); Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1346 (5th Cir. 1980); Holland v. Allied Structural Steel Co., 539 F.2d at 485; Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 37 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); Brown v. ITT Rayonier, Inc., 497 F.2d at 237; Lowe v. California Co., 296 F. Supp. 1264, 1268 (E.D. La. 1969).

417. *See, e.g.*, Mungia v. Chevron Co., U.S.A., 675 F.2d 630, 632 (5th Cir. 1982); Barrios v. Engine & Gas Compressor Servs., 669 F.2d at 353; Ardoin v. J. Ray McDermott & Co., 641 F.2d at 281; Longmire v. Sea Drilling Corp., 610 F.2d at 1346-47; Davis v. Hill Eng'g, Inc., 549 F.2d at 327-28; Holland v. Allied Structural Steel Co., 539 F.2d at 485; Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d at 37; Brown v. ITT Rayonier, Inc., 497 F.2d at 238; Rotolo v. Halliburton Co., 317 F.2d at 13; Thibodeaux v. J. Ray McDermott & Co., 276 F.2d 42, 46-47 (5th Cir. 1960); Ehrhardt v. B & G Crane Serv., Inc., 492 F. Supp. 425, 427 (E.D. La. 1980); Lynn v. Heyl & Patterson, Inc., 483 F. Supp. 1247, 1251 (W.D. Pa.), *aff'd*, 636 F.2d 1209 (3d Cir. 1980); Hartzfelds v. Travelers Ins. Co., 369 F. Supp. 955, 957 (W.D. La. 1974).

418. Stanley v. Guy Scroggins Constr. Co., 297 F.2d 374, 378 (5th Cir. 1961); *see also* Mungia v. Chevron Co., U.S.A., 675 F.2d at 633.

419. *See, e.g.*, Guidry v. Continental Oil Co., 640 F.2d at 528-29 (pusher of casing crew whose work on any vessel was usually less than 2 days); Dugas v. Pelican Constr. Co., 481 F.2d 773, 777-78 (5th Cir.) (roustabout in labor crew was sent to vessel to unload pipe for one day), *cert. denied*, 414 U.S. 1093 (1973); Rotolo v. Halliburton Co., 317 F.2d at 13 (welder who was directed to perform a single repair job on a single vessel).

420. Bertrand v. International Mooring & Marine, Inc., 700 F.2d at 248.

421. *See, e.g., id.*; Roberts v. Williams-McWilliams Co., 648 F.2d at 262; Ardoin v. J. Ray McDermott & Co., 641 F.2d at 282; Davis v. Hill Eng'g, Inc., 549 F.2d at 326-27 n.22. *But see* Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349, 1352-53 (5th Cir. 1983) (denying seaman status to a worker whose duties ended when the vessels' missions began).

422. *Compare* (finding seaman status) Parks v. Dowell Div. of Dow Chem. Corp., 712 F.2d 154, 157-58 (5th Cir. 1983); Ardoin v. J. Ray McDermott & Co., 641 F.2d at 282; Davis v. Hill Eng'g, Inc., 549 F.2d at 326-28; Noble Drilling Corp. v. Smith, 412 F.2d at 956-57; Stanley v. Guy Scroggins Constr. Co., 297 F.2d at 376-78; Creel v. Drill Tender JACK CLEVERLY, 264 F. Supp. 98, 100-02 (W.D. La. 1966) *with* (denying seaman status) Billings v. Chevron, U.S.A., Inc., 618 F.2d at 1109-10; Longmire v. Sea Drilling Corp., 610 F.2d at 1345-47; Beard v. Shell Oil Co., 606 F.2d 515, 517 (5th Cir. 1979); Kirk v. Land & Marine Applicators, Inc., 555 F.2d 481, 482-83 (5th Cir. 1977); Owens v. Diamond M Drilling Co., 487 F.2d at 75-76; Callahan v. Fluor Ocean Servs., 482 F.2d 1350, 1351-52 (5th Cir. 1973);

the United States District Court for the Western District of Louisiana demonstrate the problems in applying the permanent assignment criterion. *Creel v. Drill Tender JACK CLEVERLY*[423] and *Johnson v. Noble Drilling Co.*[424] involved injuries to mudmen on fixed platforms in the Gulf of Mexico. Creel worked for four and a half months on the tender JACK CLEVERLY in the capacity of mudman. The JACK CLEVERLY functioned in aid of drilling operations on a fixed platform by providing living, eating and recreational facilities; by serving as a cargo barge and floating base for drilling mud, drill pipe, casing and other supplies for the rig; and by pumping fluids to the rig for drilling and cementing operations.[425] As a mudman, Creel's duties "were performed almost exclusively on the tender and were required to enable the vessel to supply drilling mud to the rig on the platform."[426] Six weeks before his accident, Creel was assigned to work on the floor of the platform. Floorhands performed 90% of their duties on the platform and 10% of their work on the tenders,[427] and it was on the rig floor where Creel was injured.[428]

The court distinguished seamen from transient workers or passengers by looking to the location of the "primary employment" of the employee.[429] Although the worker eats, sleeps, and obtains supplies from the vessel, he does so as "a recipient of the services of the vessel, rather than one who performs a substantial portion of his work in furtherance of the mission of the ship."[430] Analyzing the facts in *Creel*, his primary responsibilities as floorhand were on the platform, and only 10% of his duties were on the vessel.[431] However, the four and a half month assignment to the vessel made the difference, because the court found his "attachment to the ship was permanent" and he was "clearly a member of the crew of the ship."[432] Despite his assignment to the platform, he "continued to

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Ross v. Mobil Oil Corp., 474 F.2d 989, 991 (5th Cir.), *cert. denied*, 414 U.S. 1012 (1973); Keener v. Transworld Drilling Co., 468 F.2d at 731-32; Nolan v. Coating Specialists, Inc., 422 F.2d 377, 378-79 (5th Cir. 1970); Freeman v. Aetna Casualty & Surety Co., 398 F.2d 808, 809 (5th Cir. 1968); Tipton v. Socony Mobil Oil Co., 315 F.2d 660, 661, 662 (5th Cir.), *rev'd on other grounds*, 375 U.S. 34 (1963); Texas Co. v. Savoie, 240 F.2d 674, 675 (5th Cir.), *rehearing denied*, 242 F.2d 667, 668 (5th Cir.), *cert. denied*, 355 U.S. 840 (1957); Welch v. Elevating Boats, 516 F. Supp. 1245, 1248-49 (E.D. La. 1981); Lowe v. California Co., 296 F. Supp. at 1267-68; Johnson v. Noble Drilling Co., 264 F. Supp. 104, 106-07 (W.D. La. 1966); Ross v. Delta Drilling Co., 213 F. Supp. at 271-72.

423. 264 F. Supp. 98 (W.D. La. 1966).

424. 264 F. Supp. 104 (W.D. La. 1966).

425. *Creel*, 264 F. Supp. at 100-01.

426. *Id.* at 100.

427. *Id.*

428. *Id.* at 102.

429. *Id.*

430. *Id.*

431. *Id.* at 100. The 10% could be broken down to 6% loading and unloading cargo and 4% chipping, painting, scraping, handling lines and other miscellaneous duties on the vessel.

432. *Id.* at 101.

perform a substantial portion of his duties aboard the tender in aid of the purposes of the vessel and the accomplishment of her mission."[433] Consequently, Creel was held to be a member of the crew of the tender.[434]

In *Johnson*, the derrickman was required to operate the mud pumps on the tender when additional bulk mud had to be sent to the platform, and the mudman was occasionally called upon to assist the derrickman in mixing mud on the tender. However, the mudman's duties were customarily performed in the mud room and at the hoppers and tanks on the platform.[435] He had no "regular duties" on the tender, and his work was "primarily" as a member of the platform drilling crew.[436] Johnson "did not perform any substantial duties aboard the [tender] in aid of the special functions of that vessel,"[437] and instead was a recipient of the vessel's services.[438] He was a passenger and not a member of the crew of the tender.[439]

As *Creel* demonstrates, there is no clear demarcation between the permanent assignment and substantial work prongs of the *Robison* test for seaman status. While the permanent assignment element has been reduced to being "substantial,"[440] the substantial work element has been modified to incorporate concepts of a permanent assignment. In *Keener v. Transworld Drilling Co.*,[441] the Fifth Circuit explained the substantial work test: "We merely hold that to meet the requirement of *Robison* that the workman 'performed a substantial part of his work on the vessel' it must be shown that he performed a significant part of his work aboard the ship with at least some degree of regularity and continuity."[442] The court in *Keener* could not develop a "precise delineation of that quantum of duties" which would give seaman status, stating that "there is no bright-line test to be applied in determining the frequency and regularity of performance which must be shown in order to claim the status."[443] The court could only state that "incidental and temporary duty"[444] does not

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433. *Id.*
434. *Id.* at 102.
435. *Johnson*, 264 F. Supp. at 106.
436. *Id.* at 106-07.
437. *Id.* at 106.
438. *Id.* at 107.
439. *Id.* It is interesting that Creel's employer operated the JACK CLEVERLY, *Creel*, 264 F. Supp. at 100, 101, but Johnson's employer did not own or operate the S-25. *Johnson*, 264 F. Supp. at 106, 107.
440. *See supra* text accompanying note 415.
441. 468 F.2d 729 (5th Cir. 1972).
442. *Id.* at 732. For examples of the Fifth Circuit's application of the regularity and continuity gloss, see Barrios v. Engine & Gas Compressor Servs., 669 F.2d at 353; Billings v. Chevron, U.S.A., Inc., 618 F.2d at 1110; Longmire v. Sea Drilling Corp., 610 F.2d at 1346; Davis v. Hill Eng'g, Inc., 549 F.2d at 326-27 n.22; Holland v. Allied Structural Steel Co., 539 F.2d at 484; Owens v. Diamond M Drilling Co., 487 F.2d at 75, 76.
443. *Keener*, 468 F.2d at 731-32.
444. *Id.* at 731.

suffice and that "[t]he law requires more than a showing that the claimant performed the work of a seaman on one isolated occasion."[445]

Keener is another example of a claimant working on a platform and tender. Keener spent approximately twenty to twenty-five percent of his short term of employment working on the tender, but the court considered this "incidental and temporary duty" during a "temporary hiatus in drilling operations."[446] Keener was injured on the platform,[447] and the court did not have to decide whether he might have had seaman status during the "isolated period" that he worked on the tender, because he could not carry that status "into perpetuity."[448] In *Longmire v. Sea Drilling Corp.*,[449] however, the Fifth Circuit was presented with an injury on a vessel during the "isolated period."

Longmire was a roughneck employed by Sea Drilling Corp. to work on a drilling platform supported by a tender. Longmire worked only three hitches, and his "principal duties" were performed on the platform.[450] During his first two hitches, Longmire occasionally performed duties on the tender,[451] but his third hitch was unusual because the rig on the platform was being dismantled in order to be moved to another location, and consequently there was no drilling activity.[452] Longmire assisted in the dismantling and in stowing the rig on the tender. On the day he was injured, Longmire worked his entire tour stowing anchor chains on the vessel as it weighed anchor in preparation for the move. Longmire's injury occurred when he slipped while leaving the storage compartment for the anchor chains.[453]

Since Longmire's "primary responsibilities" concerned the drilling operations on the platform and most of his work on the tender was incidental thereto, the Fifth Circuit found no evidence of permanent assignment to the tender.[454] The substantial work requirement was more difficult. Longmire's assignment to tasks on the vessel was "irregular and fortuitous" and was "entirely dependent upon and subsidiary to the progress of the drilling operation."[455] Therefore, he failed the "regularity and continuity" standard from *Keener*.[456] But *Keener* did not have to resolve

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445. *Id.; see also id.* at 732.
446. *Id.* at 731; *see also* Holland v. Allied Structural Steel Co., 539 F.2d at 484-87.
447. *Keener*, 468 F.2d at 730.
448. *Id.* at 731.
449. 610 F.2d 1342 (5th Cir. 1980).
450. *Id.* at 1344.
451. His work on the tender included general maintenance, moving supplies to or from the platform, loading and unloading supply boats and fixing the pumps on the tender which were involved in the drilling operation. *Id.* at 1345.
452. *Id.*
453. *Id.*
454. *Id.* at 1346.
455. *Id.* at 1347.
456. *See supra* text accompanying note 442.

the question "whether a claimant's work aboard a vessel, which would otherwise be insufficient to vest him with seaman's status, would be 'sufficient to afford him seaman's status during the period of his occupation with the tasks aboard the tender.' "[457] The court in *Longmire* answered that question "in the negative:"[458]

> The issue of an injured worker's status as a seaman should be addressed with reference to the nature and location of his occupation taken as a whole. While it is true that Longmire was injured aboard a vessel while performing a task that would normally be handled by a member of the ship's crew, he was assigned that task when there was no drilling operation as such in progress. . . . It can hardly be said that Longmire's incidental activities aboard the tender—maintenance, moving supplies to and from the drilling platform, and stowing the anchor chain—were sufficient, when viewed in the context of his entire employment as a member of the drilling crew, to amount to performance of "a significant part of his work aboard the ship with . . . some degree of regularity and continuity."[459]

The Fifth Circuit did not hold "once a platform worker, always a platform worker."[460] Rather, the court emphasized that the claimant's injury must be viewed in relation to his regular duties and not in isolation.[461] If a platform worker had a change in duties which involved "regular and continuous, rather than intermittent" labor in support of the mission of the vessel, then an immediate change in seaman status might be effected.[462] What the Fifth Circuit sought to avoid is "engrafting upon the statutory classification of a 'seaman' a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties."[463]

The Fifth Circuit stated in *Keener* that the "quantum of duties which . . . will make the employee a seaman" is not subject to "precise delineation."[464] Nonetheless, the Fifth Circuit has indicated that "percentages evidencing vessel-related work" can be "important" although "not conclusive."[465] Thus, in determining whether a worker is a member of a crew, his relation to the vessel is frequently ignored in favor of a numbers game involving time spent by the claimant on the vessel.[466]

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457. *Longmire*, 610 F.2d at 1347 (quoting *Keener*, 468 F.2d at 731).
458. *Longmire*, 610 F.2d at 1347.
459. *Id.* (footnote omitted). Therefore, the trial court's granting of summary judgment in favor of Sea Drilling on the issue of seaman status was affirmed. *Id.*
460. *Id.* n.6.
461. *Id.*
462. *Id.*
463. *Id.*
464. *Keener*, 468 F.2d at 731-32.
465. Bertrand v. International Mooring & Marine, Inc., 700 F.2d at 247.
466. *See, e.g.*, Bouvier v. Krenz, 702 F.2d 89, 91 (5th Cir. 1983)(50% not seaman); Bertrand v. International Mooring & Marine, Inc., 700 F.2d at 246 (90% seaman); Fox v.

The LHWCA restricts seaman status to the crew of "a vessel." Thus, the *Robison* test uses the term "vessel" in the singular four times.[467] Only a year after *Robison* was decided, however, the Fifth Circuit modified the requirement of an assignment to a vessel to include fleets of vessels.[468] In *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*,[469] a work boat capsized resulting in the drowning of two employees of the defendant, which owned and operated several ferries in New Orleans. Braniff was the Superintendent in charge of all maintenance, repair and overhaul work for the company, and Brown was his helper. Braniff generally boarded each of his employer's ferries during the morning to ascertain from the Captain whether any repair or maintenance work was necessary.[470] He would disperse a gang to do the work under his supervision. Repairs were conducted while the vessels were in operation or when withdrawn from service if necessary. Braniff occasionally performed his work in the company shop or transported equipment to independent repair contractors. Braniff was not assigned to nor did he stand watch on any one of the ferries, but he was responsible for the weekly "washing out" of the ferries' boilers, and this required his presence aboard the ferries.[471] Braniff was also in charge of the land-based machine shop and was responsible for maintenance and repair of the ferry houses.[472] Brown accompanied and assisted Braniff in these duties and also removed or lifted heavy equipment and parts.[473]

The district court granted summary judgment to the defendant on the question of seaman status because Braniff and Brown were not members of a crew of a vessel,[474] and the Fifth Circuit noted that "[t]he usual thing, of course, is for a person to have a Jones Act seaman status in

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Taylor Diving & Salvage Co., 694 F.2d at 1353 (35% of his time on vessels in dry dock or on vessel-related equipment - not seaman); Abshire v. Seacoast Prods., Inc., 668 F.2d 832, 835 (5th Cir. 1982)(90-99% - seaman); Guidry v. Continental Oil Co., 640 F.2d at 529 (50% of his assignments - not seaman); Bazile v. Bisso Marine Co., 606 F.2d 101, 103 (5th Cir. 1979)(80-90% - seaman), *cert. denied*, 449 U.S. 829 (1980); Landry v. Amoco Prod. Co., 595 F.2d 1070, 1073 (5th Cir. 1979)(70% - seaman); Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 433 (5th Cir. 1977) (all but a small fraction - seaman; *but see infra* text accompanying notes 490-97), *rev'd on other grounds*, 436 U.S. 618 (1978); Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d at 37 (3¾ days out of 74 - not seaman); Lewis v. Roland E. Trego & Sons, 501 F.2d 372, 373 (4th Cir. 1974)(90% on land - not seaman); *Keener*, 468 F.2d at 731 (20-25% - not seaman).

467. *Robison*, 266 F.2d at 779.

468. For examples of prior attempts to obtain seaman status for multiple vessels, see Weiss v. Central R.R., 235 F.2d 309 (2d Cir. 1956); Zientek v. Reading Co., 220 F.2d 183 (3d Cir.), *cert. denied*, 350 U.S. 846 (1955); Gonzales v. Riverside & Fort Lee Ferry Co., 43 F. Supp. 366 (S.D.N.Y. 1942); Kraft v. A.H. Bull S.S. Co., 28 F. Supp. 437 (S.D.N.Y. 1939).

469. 280 F.2d 523 (5th Cir. 1960).

470. *Id.* at 525.

471. *Id.* at 526.

472. *Id.*

473. *Id.*

474. *Id.*

relation to a particular vessel."[475] However, with his customary flair, Judge John R. Brown stated: "In an area already crowded with the figuratives of Twilight Zone, the no-man's-land, and the like, it will not hurt to add another."[476] Judge Brown found nothing in the "expanding concept" of seaman status which would "limit it mechanically to a single ship."[477] Thus, if the other elements of the *Robison* test are met, he saw "no insurmountable difficulty with respect to element (1) in the fact that such person is 'assigned permanently to' several specific vessels 'or perform[s] a substantial part of his work on the' several specified 'vessel[s].' "[478]

In applying the *Robison* test to the fleet of ferries, Judge Brown noted that the claimants had to board each of the ferries every morning and that much of the repair and maintenance work was performed without withdrawing the vessels from navigation.[479] In fact, it was the repair of one of the ferries which required that the workers use a work boat made fast alongside the ferry. Braniff's duties on the ferries were "a principal part of his work,"[480] and the extent of his connection with the fleet called for the judgment of the finder of fact and should not have been decided on summary judgment.[481]

The fleet of vessels to which Judge Brown referred in *Braniff* consisted of "several identifiable ships."[482] The Fifth Circuit continued to consider a fleet in terms of "specific vessels"[483] until *Higginbotham v. Mobil Oil Corp.*[484] The pilot and three passengers were killed when a helicopter crashed into the Gulf of Mexico. One of the passengers, James E. Nation, was employed by Mobil Oil Corp. as a toolpusher on a stationary platform, and his representatives claimed seaman status against Mobil, because his assignment to the platform was temporary and he had previously been employed on submersible drilling barges.[485] The trial court found as a fact that Nation was not a seaman because he was assigned to the platform at the time of his accident.[486] The Fifth Circuit, however, examined the record and found that Nation "spent all but a small fraction of his working time on Mobil's submersible drilling barges."[487] His

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475. *Id.* at 528.
476. *Id.* at 525.
477. *Id.* at 528.
478. *Id.* (quoting *Robison*, 266 F.2d at 779).
479. *Braniff*, 280 F.2d at 527.
480. *Id.*
481. *Id.* at 528, 529.
482. *Id.* at 528.
483. Rotolo v. Halliburton Co., 317 F.2d at 13.
484. 545 F.2d 422 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978).
485. Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164, 1177 (W.D. La. 1973), *aff'd in part and rev'd in part*, 545 F.2d 422 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978).
486. *Id.*
487. *Higginbotham*, 545 F.2d at 433.

assignment to the fixed platform was "presumably" as a "temporary replacement for a vacationing foreman," and there was no evidence in the record to cause the court to "believe that Nation's general pattern of employment would have changed substantially had he lived."[488] Despite "intermittent temporary assignments to fixed platforms as the course of drilling operations required," the Fifth Circuit concluded that "the undisputed evidence requires a finding that Nation was a seaman."[489]

The Fifth Circuit's characterization of the record in *Higginbotham* is misleading in several ways. The court refers to "Mobil's submersible drilling barges,"[490] yet the evidence was undisputed that only one of the rigs on which Nation worked was owned by Mobil.[491] Nation was intermittently assigned to four vessels,[492] three platforms,[493] one tender/platform[494] and had two land assignments.[495] The assignments between land, platforms and vessels did not evince any permanent connection with vessels,[496] and the amount of time spent on vessels was less than the total time spent on land and platforms.[497] Thus, the identifiable fleet to which Nation was assigned consisted of random platforms and vessels in the Gulf of Mexico and a land-based office. Since companies other than his employer owned all but one of the vessels on which he worked, the fleet was limited only by the available rigs in the Gulf of Mexico.

The Fifth Circuit did not attempt[498] to place limitations on the expansive fleet in *Higginbotham* until *Guidry v. Continental Oil Co.*[499] Guidry was employed by Offshore Casing Crews as pusher of a casing crew. His crew was assigned to work on the drilling vessel MARLIN NUMBER

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488. *Id.*

489. *Id.*

490. *Id.*

491. Testimony of U.W. Stanabury, Record at 1486, *Higginbotham*, 545 F.2d 422.

492. *Id.* at 1459-90. The vessels were the PENROD 50, PENROD 53, PENROD 55 and PENROD 56.

493. *Id.* The three platforms were the Houma Well Service No. 6, Baxter No. 3 and Baxter No. 5.

494. *Id.* The tender was the DELTA MARINE NO. 8.

495. *Id.* He had two assignments to the Corpus Christi Division of Mobil, and during one he worked on the PENROD 56. During one ten-month land-based assignment, there was no evidence that Nation spent any time on a vessel.

496. The order of his assignments was as follows: vessel, platform, tender/platform, vessel, platform, vessel, platform, vessel, land (with some vessel work), platform, land, vessel and platform.

497. Although some periods of time in his twenty-six months of employment for Mobil were not accurately accounted for, the only evidence introduced indicated that Nation's duties were performed as follows: 43.7% on vessels, 32.6% on land and 23.7% on platforms. Brief Amici Curiae on Behalf of Reading & Bates Drilling Co. and International Association of Drilling Contractors at 12, *Higginbotham*, 545 F.2d 422.

498. An example of the continuing vagueness of the fleet giving rise to seaman status is Landry v. Amoco Prod. Co., 595 F.2d at 1073-74.

499. 640 F.2d 523 (5th Cir.), *cert. denied*, 454 U.S. 818 (1981).

SIX, and Guidry was injured on the rig floor.[500] This was Guidry's twenty-ninth "random"[501] assignment in the approximately five months he was employed by Offshore Casing Crews, and his connection with any rig was usually less than two days.[502] Guidry claimed that he satisfied the *Robison* test because "he substantially performed his casing duties" on the vessel and because his duties were essential to the vessel's mission of drilling for oil.[503] In view of the random assignments for brief periods, the trial court granted summary judgment against Guidry on seaman status because he "was not assigned to any specific vessel or group of vessels."[504] Judge Brown, who authored *Braniff*, returned the Fifth Circuit to the principles which permitted the extension of seaman status to fleets of vessels: that there must be a substantial relationship with an *identifiable* vessel or group of vessels which is not spasmodic.[505] Although his assignments were similar to those of Nation in *Higginbotham*,[506] the Fifth Circuit found Guidry's assignments were "random" and lacked the "continuing or regular basis" necessary to give seaman status.[507]

In most of the decisions which have found seaman status on more than one vessel, the fleet has consisted of vessels owned or operated by the seaman's employer.[508] This fleet constitutes a finite and definable class of vessels to which a worker can develop a relationship of sufficient "permanency"[509] to be considered a member of its crew. Attempts to obtain seaman status aboard a non-employer fleet demonstrate the absurd-

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500. *Id.* at 525-26.

501. *Id.* at 525.

502. *Id.* at 526. Except for three land rigs, all of Guidry's assignments for Offshore Casing Crews were to vessels or platforms. *Id.* n.2.

503. *Id.* at 528.

504. *Id.* at 527.

505. *Id.* at 529.

506. Guidry worked on 40 rigs during his career: 20 vessels (50%), 13 platforms (32.5%) and 7 land rigs (17.5%). *Id.* Nation's time was spent 43.7% on vessels, 32.6% on land and 23.7% on platforms. *See supra* note 497.

507. *Guidry*, 640 F.2d at 529.

508. *See, e.g.*, McDermott, Inc. v. Boudreaux, 679 F.2d 452, 454 (5th Cir. 1982); Searcy v. E.T. Slider, Inc., 679 F.2d 614, 615 (6th Cir. 1982); Mungia v. Chevron Co., U.S.A., 675 F.2d at 631; Abshire v. Seacoast Prods., Inc., 668 F.2d at 834-36; Ardoin v. J. Ray McDermott & Co., 641 F.2d at 279; Bazile v. Bisso Marine Co., 606 F.2d at 102; Landry v. Amoco Prod. Co., 595 F.2d at 1071, 1073; Magnolia Towing Co. v. Pace, 378 F.2d 12, 13 (5th Cir. 1967); Matherne v. Cheramie Boat Rentals, Inc., 550 F. Supp. 1124, 1127 (E.D. La. 1982). *But see, e.g.*, Taylor v. Packer Diving & Salvage Co., 342 F. Supp. 365, 371 (E.D. La. 1971), *aff'd*, 457 F.2d 512 (5th Cir. 1972); Williams v. Milwhite Sales Co., 197 F. Supp. 730, 732 (E.D. La. 1961).

509. Fazio v. Lykes Bros. S.S. Co., 567 F.2d at 303. In *Fazio* a shoregang member was denied seaman status to the fleet of his employer's vessels. Although his work was "at times substantial," it was "entirely transitory." *Id.; see also* Bouvier v. Krenz, 702 F.2d at 90-92; Jones v. Mississippi River Grain Elevator Co., 703 F.2d 108, 109 (5th Cir. 1983); Barrios v. Engine & Gas Compressor Servs., 669 F.2d at 353; Holland v. Allied Structural Steel Co., 539 F.2d at 479, 486; Rotolo v. Halliburton Co., 317 F.2d at 13; *cf.* Fox v. Taylor Diving & Salvage Co., 694 F.2d at 1354.

ity of the substantial work test promulgated in *Robison*.

In *Bertrand v. International Mooring & Marine, Inc.*,[510] the workers were members of an anchorhandling crew employed by International Mooring & Marine. They were assigned to assist in relocating Tenneco's drilling rig, the MARLIN 7, between Intercoastal City, Louisiana and a point off the coast of Galveston, Texas.[511] Tenneco chartered the AQUA-MARINE 503, which was specifically outfitted for lifting anchors from the ocean floor and which had a crew consisting of a master, cook, mechanic and deckhands.[512] The International Mooring & Marine employees ate and slept on the vessel during the move which lasted seven days and assisted in readying the vessel for its mission.[513] While returning from the job in a company van, one employee was killed and three employees were injured in a traffic accident.[514] Since the workers were not assigned to any "specific vessel or group of vessels," the trial court granted summary judgment to International Mooring & Marine on the issue of seaman status.[515] The trial court recognized that the employer does not have to be the shipowner in order to have Jones Act liability,[516] but in order to satisfy the necessity of an assignment to a specific group of vessels, the court required "that the group or fleet act together under one control or gather closely together and form a recognizable unit. Therefore, it would appear that one cannot be a member of a crew of numerous vessels, which have no common ownership or control."[517]

The Fifth Circuit confused the district court's attempt to give meaning to "a specific vessel or group of vessels" with a requirement that the employer own the vessels: "We have never held that a seaman is barred from coverage under the Jones Act if the employer neither owns nor controls the several vessels upon which the seaman works."[518] The Fifth Circuit would not "allow employers to deny Jones Act coverage to seamen by

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510. 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3533 (U.S. Jan. 16, 1984).
511. *Id.* at 242.
512. *Id.* and n.2.
513. *Id.* at 242-43.
514. *Id.* at 243.
515. Bertrand v. International Mooring & Marine, Inc., 517 F. Supp. 342, 348 (W.D. La. 1981), *rev'd*, 700 F.2d 240.
516. *Id.* at 346.
517. *Id.* at 347; *see supra* note 439.
518. *Bertrand*, 700 F.2d at 245. In a subsequent decision the Fifth Circuit used the same analysis it rejected in *Bertrand*. In denying seaman status to a bargeman who worked on barges at his employer's grain elevator, the court pointed out that none of the barges were owned by the worker's employer. Jones v. Mississippi River Grain Elevator Co., 703 F.2d at 109. See also Bouvier v. Krenz, 702 F.2d at 91, in which the Fifth Circuit rejected a shipyard worker's attempt to gain seaman status on the "variously owned vessels" which were repaired at his employer's shipyard; Hebert v. Air Logistics, Inc., 720 F.2d 853, 856-57 (5th Cir. 1983) in which a helicopter pilot employed by Air Logistics was denied seaman status to the fleet of barges owned by Brown & Root to which the pilot ferried workers.

arrangements with third parties regarding the vessel's operation or by the manner in which work is assigned."[519] After opening the fleet to an indefinite number of vessels, the Fifth Circuit did concede that as "the number of vessels increases or the period of service decreases, the claimant's relationship with the vessels tends to become more tenuous and transitory."[520] Although "these factors are not determinative . . . they should be considered when applying the *Robison* criteria."[521]

In applying the substantial work test in *Bertrand*, the Fifth Circuit stated that the crew "was regularly and continuously assigned to vessel-related activity."[522] The remaining ten percent of the crew's time was spent "preparing equipment for [the] offshore vessel assignments."[523] Thus, there was sufficient evidence that the workers "performed a substantial portion of their work on vessels."[524] The court also analyzed the permanent assignment prong of *Robison* and noted that the workers "tour of duty with a vessel was for the duration of the vessel's mission."[525] Contrary to laborers who perform "a specialized job that contributes toward the vessel's larger mission," the anchorhandlers' job and the vessel's mission were "coextensive."[526] They never worked except in conjunction with vessels; their work on the vessels was their primary duty; and they aided in readying the vessel for its mission.[527] The court concluded: "Each of these factors provide [sic] further evidence that a reasonable person could conclude that plaintiffs were seamen by virtue of a permanent attachment to the vessels."[528]

The interpretation given by the Fifth Circuit in *Bertrand*[529] to the *Robison* elements of a vessel (fleet) and permanent assignment/substantial work simply dispenses with the restriction placed on seaman status

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519. *Bertrand*, 700 F.2d at 245.
520. *Id.* at 246.
521. *Id.*
522. *Id.* at 247 (footnote omitted).
523. *Id.* (quoting *Bertrand*, 517 F. Supp. at 344).
524. *Bertrand*, 700 F.2d at 247.
525. *Id.* at 248.
526. *Id.*
527. *Id.*
528. *Id.*
529. In another recent decision, Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349, the Fifth Circuit came to a more sensible result. Despite the fact that the worker performed 35% of his duties on vessels or vessel-related equipment, the court denied seaman status because his duties were not "substantially related to the tasks traditionally performed by blue water seamen. Mechanics, like welders and boilermakers, do not perform the regular ocean-related work or even the support tasks of blue water seaman." *Id.* at 1353. The court's reasoning illustrates the difficulty in applying the *Robison* test. One heading used in the discussion was "Fox's position was not a seaman's job." *Id.* at 1352. The court was unable to pigeonhole this concept in the *Robison* test and denied seaman status because he failed the permanent connection/substantial work test. Without discarding the *Robison* test, it would have been more appropriate to analyze the case under the second element of the *Robison* test and hold that the worker's duties did not contribute to the vessel's mission.

by Congress that the worker must be a member of a crew of a vessel.[530] The courts have "suggested that the permanency requirement is the fundamental distinction between seamen and longshoremen."[531] Congress chose to use the term "member of a crew" "to distinguish between maritime workers whose presence aboard ship is transitory from those with a more permanent attachment to the vessel."[532] By defining the "fleet" as the vessels on which the claimant works and only requiring that he spend his time on those vessels, the test for seaman status has been returned to the pre-LHWCA era in which longshoremen and other land-based or transient maritime workers were considered seamen.[533]

c. *Contribute to the Vessel's Function or Mission*

While most of the lower courts have continued to apply the aid in navigation test from *Carumbo*,[534] their interpretation of that test often has been similar[535] to the construction given by the Fifth Circuit to the

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530. See Boudreaux v. American Workover, Inc., 680 F.2d 1034, 1053 (5th Cir. 1982) (en banc), *cert. denied*, 103 S. Ct. 815 (1983), in which the Fifth Circuit describes congressional intent to distinguish between "crew" and "non-crew" offshore oil workers.

531. Bullis v. Twentieth Century-Fox Film Corp., 474 F.2d 392, 394 n.9 (9th Cir. 1973) (citing A.L. Mechling Barge Line v. Bassett, 119 F.2d 995, 998 (7th Cir. 1941)); Weiss v. Central R.R., 235 F.2d at 313, 315 (Lumbard, J., dissenting).

532. Noble Drilling Corp. v. Smith, 412 F.2d at 955.

533. The Fifth Circuit has indicated that it will not completely dispose of the member of a crew requirement from the LHWCA. In Bouvier v. Krenz, 702 F.2d at 91, the court stated: "The language of the LHWCA thus strongly supports, indeed arguably demands, the conclusion that a harbor-bound ship repairman is as a matter of law not a 'member of a crew' and thus not a Jones Act seaman." In Fox v. Taylor Diving & Salvage Co., 694 F.2d at 1353, the Fifth Circuit stated: "Fox's contention of permanent assignment to a fleet, if accepted, would extend Jones Act coverage to every employee of a maritime company, right down to the harbor workers and even the reservations clerks for a vacation cruise line. Such an interpretation is unreasonable." *See also* Jones v. Mississippi River Grain Elevator Co., 703 F.2d at 109.

534. *See supra* text accompanying notes 320-21.

535. But see Harney v. William M. Moore Bldg. Corp., 359 F.2d 649 (2d Cir. 1966), in which the Second Circuit struggled with the contribute-to-the-vessel's-function-or-mission gloss on the aid in navigation test:

> It is not clear from these cases whether the duties on board which contribute to the functioning of the vessel's mission, but do not contribute to the functioning of the vessel itself, are among those whose presence may lead to a "salty inference." The possibility that they are becomes important in those cases where the purely nautical tasks are reduced to a minimum.

Id. at 655 (footnote omitted). The court also stated that the Supreme Court's use of the phrase "significant navigational function" may have been "meant to convey the rule that for an employee on a special purpose vessel, whose chief duties are in furtherance of that function, to be a crewman, entitled to Jones Act remedies, his other duties, in aid of navigation, must be significant." *Id.* n.6. The Second Circuit did not have to decide, however, whether the tasks must be in furtherance of the vessel's special mission or of the vessel itself, because the court found that the worker performed sufficient navigational tasks and seaman's duties. *Id.* at 656.

element in *Robison*[536] that the worker's duties contribute to the vessel's function or mission.[537] After eliminating the aid in navigation test, the substituted contribute-to-the-vessel's-function-or-mission standard has become a weak sister to the permanent assignment/substantial work element.[538] The resolution of the permanent assignment/substantial work is-

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536. *Robison*, 266 F.2d at 779.

537. *See, e.g.*, A.L. Mechling Barge Line v. Bassett, 119 F.2d 995, 998 (7th Cir. 1941) (the court found a cook "was acting in aid and support of navigation" because such services are "essential to the successful and continuing operation of the boat."); *see also* Weiss v. Central R.R., 235 F.2d 309, 312 (2d Cir. 1956)(ferry deckhand and wheelman/shoreside doorman or bridgeman); Ramos v. Universal Dredging Corp., 547 F. Supp. 661, 665-66 (D. Hawaii 1982); *cf.* Mahramas v. American Export Isbrandtsen Lines, 475 F.2d 165, 170 (2d Cir. 1973)(hairdresser). For examples of workers whose duties have been considered to be in aid of navigation, see Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 374 (1957)(handyman on dredge); Mungia v. Chevron Co., U.S.A., 675 F.2d 630, 631, 633 (5th Cir. 1982)(worker who traveled to and from work locations on 16- to 20-foot Jo-Boats); Summerlin v. Massman Constr. Co., 199 F.2d 715, 716 (4th Cir. 1952)(fireman on floating derrick); Jeffrey v. Henderson Bros., Inc., 193 F.2d 589, 592-93 (4th Cir. 1951)(worker performing coal cleaning and screening on barge); Daffin v. Pape, 170 F.2d 622, 624-25 (5th Cir. 1948)(all-purpose laborer on yacht); Spiller v. Thomas M. Lowe, Jr. & Assocs. Inc., 328 F. Supp. 54, 60 (W.D. Ark. 1971)(worker mapping and surveying river from a 16-foot flat bottom boat), *aff'd*, 466 F.2d 903 (8th Cir. 1972). For examples of workers whose duties were not found to be in aid of navigation, see Simko v. C & C Marine Maintenance Co., 594 F.2d 960, 964 (3d Cir.)(worker who performed cleaning and minor repair of barges), *cert. denied*, 444 U.S. 833 (1979); Whittington v. Sewer Constr. Co., 541 F.2d 427, 434 (4th Cir. 1976)(laborer employed to help demolish bridge engaged in loading scrap on barge); Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 37 (3d Cir. 1975)(worker from labor pool assisting in the loading of barges), *cert. denied*, 423 U.S. 1054 (1976); Klarman v. Santini, 503 F.2d 29, 33 (2d Cir. 1974)(member of auxiliary police force receiving on-the-job training on a 26-foot launch), *cert. denied*, 419 U.S. 1110 (1975); Hardaway Contracting Co. v. O'Keeffe, 414 F.2d 657, 658, 661 (5th Cir. 1968)(laborer building a bridge does not aid in navigation of launch); Nelson v. Greene Line Steamers, 255 F.2d 31, 33 (6th Cir.)(laborer preparing excursion steamer for the following season), *cert. denied*, 358 U.S. 867 (1958); Texas Co. v. Savoie, 240 F.2d 674, 675 (5th Cir.)(roustabout on platform considered passenger on support vessel), *rehearing denied*, 242 F.2d 667 (5th Cir.), *cert. denied*, 355 U.S. 840 (1957); Taylor v. McManigal, 89 F.2d 583, 585 (6th Cir. 1937)(mechanic outfitting passenger vessel for the following season); Seneca Washed Gravel Corp. v. McManigal, 65 F.2d 779, 780 (2d Cir. 1933)(watchman); Lynn v. Heyl & Patterson, Inc., 483 F. Supp. 1247 (W.D. Pa.)(ironworker employed as rigger in construction of a barge haul system does not aid in navigation of crane barge), *aff'd*, 636 F.2d 1209 (3d Cir. 1980); Chapman v. M/G Transp. Servs., Inc., 432 F. Supp. 723, 725 (W.D. Pa. 1977)(welder performing repair work on a salt brine barge); Specht v. Pittsburgh Coal Co., 432 F. Supp. 717, 720 (W.D. Pa. 1975)(repairman replacing rubber stripping on vessel).

538. *But see* Stanley v. Guy Scroggins Constr. Co., 297 F.2d 374 (5th Cir. 1961). The Fifth Circuit used the contribute-to-the-vessel's-function-or-mission test as the essential ingredient for the seaman status test:

> From these two decisions we derive the principle that a man having a part to play in the mission of a special function vessel may be a seaman, while a man who has no such part and who does not participate in conducting the operations of the vessel (whether they relate to transportation or to a special function) but merely *receives* transportation is not a seaman.

Id. at 377 (emphasis supplied).

sue has generally led to a similar holding on the contribute-to-the-vessel's-function-or-mission test.[539]

The only significant purpose which remains for the contribute-to-the-vessel's-function-or-mission element is to preclude passengers who might perform some work on a vessel from attaining seaman status.[540] One of the few exceptions[541] is *Hale v. Tata Corp.*[542] in which a local steamship

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539. For examples of cases concluding that both elements were met, see Bertrand v. International Mooring & Marine, Inc., 700 F.2d at 246-48 (anchorhandler on vessel specially outfitted for lifting anchors); McDermott, Inc. v. Boudreaux, 679 F.2d 452, 456, 458-59 (5th Cir. 1982)(pipeline welder on pipelaying barge); Searcy v. E.T. Slider, Inc., 679 F.2d 614, 616 (6th Cir. 1982)(watchman for sand and gravel business and vessels moored at its dock); Roberts v. Williams-McWilliams Co., 648 F.2d 255, 261-62 (5th Cir. 1981)(welder on derrick barge); Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 281-83 (5th Cir. 1981)(welder on derrick barge); Crador v. Louisiana Dept. of Highways, 625 F.2d 1227, 1229 (5th Cir. 1980)(highway department repairman on ferry), *cert. denied*, 452 U.S. 915 (1981); Davis v. Hill Eng'g, Inc., 549 F.2d 314, 326-28 (5th Cir. 1977)(welder's helper on derrick barge); Stafford v. Perini Corp., 475 F.2d 507, 510 (1st Cir. 1973)(dockbuilder on barge); Neill v. Diamond M Drilling Co., 426 F.2d 487, 489 (5th Cir. 1970)(motorman on submersible drill barge); Kimble v. Noble Drilling Corp., 416 F.2d 847, 848-49 (5th Cir. 1969)(driller on tender to platform), *cert. denied*, 397 U.S. 918 (1970); Noble Drilling Corp. v. Smith, 412 F.2d 952, 956 (5th Cir.)(mud pumper on tender to platform), *cert. denied*, 396 U.S. 906 (1969); Ramos v. Universal Dredging Corp., 547 F. Supp. at 665-67 (deckhand on dredge); Porche v. Gulf Miss. Marine Corp., 390 F. Supp. 624, 631 (E.D. La. 1975)(welder on pipelaying barge); Dardar v. Louisiana, 322 F. Supp. 1115, 1121 (E.D. La.)(highway department utility laborer on ferry), *aff'd*, Dardar v. Louisiana State Dept. of Highways, 447 F.2d 952 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); Creel v. Drill Tender JACK CLEVERLY, 264 F. Supp. 98, 101 (W.D. La. 1966)(mudman on tender to platform). For examples of cases concluding that both elements were not met, see Dove v. Belcher Oil Co., 686 F.2d 329, 333-34 (5th Cir. 1982)(worker delivering instructions on launch); Beard v. Shell Oil Co., 606 F.2d 515, 517 (5th Cir. 1979)(platform worker on crewboat); Callahan v. Fluor Ocean Servs., Inc., 482 F.2d 1350, 1352 (5th Cir. 1973)(platform worker on crewboat); Welch v. Elevating Boats, 516 F. Supp. 1245, 1248-49 (E.D. La. 1981)(platform worker on elevator boat); Ehrhardt v. B & G Crane Serv., Inc., 492 F. Supp. 425, 427 (E.D. La. 1980)(worker assisting in unloading steel girders from barges and raising them into position to construct a bridge foundation); Lowe v. California Co., 296 F. Supp. 1264, 1268 (E.D. La. 1969)(platform worker on tender); Johnson v. Noble Drilling Co., 264 F. Supp. 104, 106-07 (W.D. La. 1966)(platform worker on tender).

540. *See, e.g.*, Dove v. Belcher Oil Co., 686 F.2d at 332, 333, 334; Beard v. Shell Oil Co., 606 F.2d at 517; Callahan v. Fluor Ocean Servs., Inc., 482 F.2d at 1352; Johnson v. Noble Drilling Co., 264 F. Supp. at 107. *But see* Coulter v. Texaco, Inc., 714 F.2d 467, 469 (5th Cir. 1983)(worker on land-based drilling rig is a seaman of the vessel used to transport the workers and equipment to the drilling site); Mungia v. Chevron Co., U.S.A., 675 F.2d 630, 631-33 (5th Cir. 1982)(worker who travels to and from well structures, Christmas trees and tank batteries on sixteen- to twenty-foot Jo-Boats is seaman).

541. *Cf.* Freeman v. Aetna Casualty & Surety Co., 398 F.2d 808, 809 (5th Cir. 1968)(platform worker who occasionally mixed mud on a tender was not "performing the traditional work of a seaman."). The Fifth Circuit has not permitted administrative fact finders to conclude that a worker does not satisfy the aid in navigation or contribute-to-the-vessel's-function-or-mission test while holding that the worker does have an adequate permanent assignment. *See, e.g.*, McDermott, Inc. v. Boudreaux, 679 F.2d at 456, 458-59; *cf.* Boatel, Inc. v. Delamore, 379 F.2d 850, 857, 858-59 (5th Cir. 1967).

542. 502 F. Supp. 502 (S.D. Tex. 1980).

agent claimed seaman status against his employer for the duties he performed aboard ships, including placing the ship's register, load line, oil pollution certificates and other papers on the vessel.[543] It was not clear on his employer's motion for summary judgment how much of the agent's work was performed on vessels, but the court held that there was "no basis to support a conclusion that Plaintiff's work contributed to the physical function of the vessel or to its navigation, operation or welfare."[544]

The expansive scope of the contribute-to-the-vessel's-function-or-mission test is demonstrated by the strain that this element has placed on the permanent assignment/substantial work test. Thus, casual workers who perform some transitory work on a vessel which relates to its mission have sought and been denied seaman status because they lack the assignment to a vessel.[545] In *Brown v. ITT Rayonier, Inc.*,[546] a college student, Harry Brown, was employed for several weeks at Christmas to take wood pulp samples and to conduct certain tests.[547] On one occasion he and another employee, Lott, took a three and one-half hour trip on the Altamaha River in a 17-foot outboard motorboat to collect water samples for an effluent control program at the plant.[548] Lott was distracted by a friend on the bank to whom he was waving, and the vessel struck a stump while traveling at 30 miles per hour.[549] The Fifth Circuit considered Brown to be aboard the vessel "strictly for the purpose of aiding in its navigation."[550] Unlike the "services performed by shore-based workers upon docked vessels," his tasks "could only be performed while the vessel was under weigh" and "were directly a part of the vessel's navigational mission."[551] However, Brown spent less than one percent of his total time on the water,[552] and it was "merely incidental to [his] shore-based employment that he [had] gone upon the water."[553] Thus, the court concluded that he was a "casual worker on the water" and was "more appro-

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543. *Id.* at 504.
544. *Id.* at 505.
545. *See, e.g.*, Lewis v. Roland E. Trego & Sons, 501 F.2d 372, 373, 374 (4th Cir. 1974); Voison v. O.D.E.C.O. Drilling, Inc., 557 F. Supp. 715, 718 (E.D. Tex. 1982); see also Searcy v. E.T. Slider, Inc., 679 F.2d at 616-17, in which the Sixth Circuit reversed the district court's grant of summary judgment to the employer on the basis of lack of a permanent connection and failure to perform substantial work on the vessel. The district court had concluded that the inspection and maintenance of gas pumps on a barge and the placing of lights on the barge were adequate evidence on the aid in navigation element. *Id.* at 616.
546. 497 F.2d 234 (5th Cir. 1974).
547. *Id.* at 235.
548. *Id.*
549. *Id.*
550. *Id.* at 237.
551. *Id.* at 237-38.
552. *Id.* at 236.
553. *Id.* at 238.

priately classed with shore-based workers than with seamen."[554]

After *Brown* the Fifth Circuit was presented with an attempt to enlarge the seaman status test so that work which contributes to the vessel's mission would be sufficient if the claimant sustained his injury while performing that work on the vessel. In *Longmire v. Sea Drilling Corp.*,[555] the Fifth Circuit answered the question "whether a claimant's work aboard a vessel, which would otherwise be insufficient to vest him with seaman's status, would be 'sufficient to afford him seaman's status during the period of his occupation with the tasks aboard the [vessel].' "[556] Retaining its requirement that there be a permanent assignment or substantial work on the vessel, the court denied seaman status based on the "nature and location of his occupation taken as a whole."[557] Thus, while the element that the seaman's duties must contribute to the vessel's mission has little effect, the Fifth Circuit has given some meaning to the permanent assignment/substantial work test by requiring more than one incidental or isolated contact with a vessel.

VIII. CONCLUSION

It is unfair to criticize the circuit courts for the myriad of standards and lack of uniformity in administering the elements of seaman status. The fault lies in the series of Supreme Court decisions which provide no guidance for the lower courts and which undermine that Court's previous efforts to establish guidelines for determining seaman status. Although the Supreme Court initially supported Congress' attempts to distinguish between land-based maritime workers and seamen, with the passage of time the term "member of a crew" was stripped of its restrictive meaning and given the broad definition of seaman developed in the Nineteenth and early Twentieth Centuries. Congress' intent of treating shore-based maritime workers like other land-based employees has been lost in confusing decisions from the Supreme Court, and the lower courts must continue to flounder in a sea of uncertainty until the Supreme Court reexamines the issue of seaman status.

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554. *Id.* (quoting South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 260 (1940)(quoting Scheffler v. Moran Towing & Transp. Co., 68 F.2d 11, 12 (2d Cir. 1933))).

555. 610 F.2d 1342 (5th Cir. 1980).

556. *Id.* at 1347 (quoting Keener v. Transworld Drilling Co., 468 F.2d 729, 731 (5th Cir. 1972)).

557. *Longmire*, 610 F.2d at 1347.